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# KENTUCKY LAW REPORTER AND JOURNAL

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## NOTES OF CASES.

### I.

In American Board, &c. v. Ferry, U. S. Cir. Ct. Mich., 15 Fed. Rep., 696, it is held that a testator may in his will provide that his executor shall act as umpire, and invest him with power to construe his will and determine every doubtful question that may arise touching the testator's intentions; and if such umpire acts in good faith his decisions will not be interfered with by the courts, though such decisions may be erroneous. (Pray v. Belt, 1 Pet., 679.)

### II.

In Haish v. Payson, Ill. Sup. Ct., 15 Chi. Leg. News, 307, it is held that in a suit by an attorney to recover a fee he can not have the jury consider the prospective benefits which may arise in future to the client from the settlement effected by the attorney; and so he could not introduce evidence to show that his client would save in royalties in the next fourteen years the magnificent sum of $1,120,000. While the amount involved might be considered in fixing the fee, yet it is inadmissible to go into an inquiry of prospective benefits to accrue in future. The calculation of such benefits is not a statement of facts, but of opinion. (Eggleton v. Boardman, 37 Mich., 18; Robbins v. Harvey, 5 Conn., 341.)

III.

Apropos of attorney's fees, it is held in Kersey v. Garten, Mo. Ct. of Appeals, 16 Cent. L. J., 472, that where the fees of attorneys employed in an action of ejectment are on condition that if successful they are to have a specified share of the estimated value of the land recovered and nothing if there is no recovery, and after instituting suit the same is dismissed by the client without their consent, the attorneys may recover to same extent as if they had succeeded in recovering the land.

IV.

In an action on a policy the insurance company set up that the action was barred by the provision in the policy limiting the right of action to six months after it accrued. Plaintiff replied that he was induced to delay the suit by the assurance of the company's agent that the company would pay without litigation, if the amount could be agreed on, and that negotiations for a settlement had been entered on. The court said: "If the delay to bring suit is a result to which the company mainly contributed by holding out hopes of amicable adjustment, the company can not take advantage of the delay under the limitation clause in the policy." (Martin v. State Ins. Co., 44 N. J., 485; Waynesboro Mut. F. Ins. Co. v. Conover, 98 Penn. St., 384.)

V.

A devise by a wife of her real estate to her husband for life "if he shall not marry," but in the event of his marriage to her brother, is valid. There is no substantial distinction between a condition in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. They are each and both valid and effectual. (Bostick v. Blades, 59 Md., 231.)

VI.

The U. S. Supreme Court has recently decided that an attorney may be disbarred for participation in a riot; and that, although in ordinary cases, where an attorney commits an in-

dictable offense, not in his character of attorney, and does not admit the charge, the courts will not strike his name from the roll until he is regularly indicted and convicted, yet that the rule is not an inflexible one; that there may be cases in which the court should proceed without such previous conviction; and that this case, owing to its special circumstances, the evasive denial of the charge, the clearness of the proof, the failure to offer counterproof, was one in which the court might proceed summarily and disbar without the filing even of an affidavit against the attorney. It is also said that a proceeding to strike an attorney from the roll is not a criminal proceeding, and is not intended for punishment, but to protect the court from the official ministration of persons unfit to practice, hence proceeding summarily against him in such matters is not depriving him of his constitutional right to a full and fair trial. (Ex Parte Wall, 27 Alb. L. J., 406.) As to conduct for which an attorney may be disbarred, see 1 Kentucky Law Reporter and Journal, 913.

VII.

The owner of a tannery, when removing his hides, omitted to remove all. The tannery was sold, and many years after the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. Held—That the owner of the hides or his representative had not lost his title to them, and that the finder acquired no title to the same, they being neither lost, abandoned, derelict, nor treasure trove. (Livermore v. White, Me. Sup. Ct., 27 Alb. L. J., 414.) The hides were not treasure trove because nothing is treasure trove but gold and silver. They were not lost, abandoned or derelict because the owner was known and they were left in the vat through carelessness, and if the fact of their being there was forgotten by the owner they are none the less his. As in McAovry v. Medina, 11 Allen, 548, a customer left his pocket book, through forgetfulness, upon a table in the shop, and it was held he had not by any means abandoned it in such sense as to make it lost property. There is an interesting case on this question in 11 R. I., 588, Durfee v. Jones, where plaintiff bought an old safe and delivered it to defendant, a

blacksmith, to sell, with permission to use it. Defendant shortly afterwards found secreted between the outer casing and inner lining a roll of bills amounting to $165. Plaintiff, on learning of the finding, demanded the return of the safe and its contents precisely as they existed when placed in defendant's hands. Defendant gave up the safe but retained the money, and plaintiff sues for it. He does not claim that he acquired, by purchase of the safe, any right to the money in it as against the owner, but that as between himself and defendant—a mere finder—his right is the better. But the court said the general rule that the finder of lost property is entitled to it as against all the world except the real owner applies in this case, and the fact that the money was found in the safe is immaterial. The place of finding does not alter the rights of parties.

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## KENTUCKY COURT OF APPEALS.

### WALKER, &c. v. SMYSER'S EX'ORS.

(Filed May —, 1883.)

Infant's real esate—Sale of under Revised Statutes—Guardian or trustee having no power to sell, or trustee having such power, but intending to change the form of the trust property, must have proceeded under article 8, chapter 86, Revised Statutes, in order to sell the real estate of the infant; and a joint tenant or tenant for life also, in order to sell land in which infant is interested, must follow provisions of that statute.

2. Compelling trustee to act—A conveyed real estate in trust for herself for life, with remainder to her children, and gave power to the trustee to sell and reinvest on her request, and when he thought her interest required it, but also provided that he might, for his better protection, require petition in chancery to be filed authorizing the sale. Held—That he subsequently refusing to sell until empowered by court, and the suit being brought accordingly against him by the life tenant, infants holding remainder were not necessary parties, such suit not being a proceeding under the Revised Statutes, but an action to coerce a recusant trustee.

3. Trustee with power to sell applying to court—Estates may be conveyed in trust with power to trustee to sell whenever the interest of life tenant requires without consulting the interest of those in remainder and without the direction of the court. But if in such cases the court be applied to by the trustee and the beneficiaries, it has jurisdiction to decree the sale, and the purchaser is protected.

4. Jurisdiction, obtained by consent, to coerce trustee—So where trustee is invested with a power purely discretionary, he can not be coerced by the

**courts, but if he and those who have the right to unite with him ask the court to administer the trust the chancellor thereby obtains jurisdiction.**

Appeal from Louisville Chancery Court.

Judge Pryor delivered the following response to a petition for rehearing:

The exhaustive petition for a rehearing by counsel for the appellants indicates much labor and research in the investigation of the question made, but fails to establish, by argument or authority, the fallacy they maintain exists in the opinion already delivered affirming the judgment of the court below. This case has been twice heard upon oral arguments made and briefs filed, two opinions having been delivered affirming the judgment, and now we are considering a petition asking for a third hearing and the reversal of the judgment. This is a departure from the well-settled practice of this court, and, if indulged in, there can be no end to the litigation here. The desire of the court, however, to gratify counsel, and the still greater desire to have a correct exposition of the law of this case, constituted the reasons for the extended privileges granted counsel in the particular case. The entire argument is directed to the powers of a court of equity over the sale and reinvestment of the real estate of infants and married women, maintaining, as will be conceded for the purposes of this case, that such a power is now statutory. It is further insisted that no agreement between parties can confer jurisdiction so as to affect the rights of others. This proposition will also be conceded. If without jurisdiction an agreement between the parties can not confer it, so there is but little, if any, difference between counsel and the court as to the mode of proceeding when attempting to sell the real estate of those laboring under disability. The application of the rule, its meaning and the class of cases embraced by it is the real issue, and upon a careful reconsideration of the record, as well as the arguments advanced in the petition for a rehearing, we perceive no reason for receding from the opinion already delivered.

It may be proper to refer to the statutes under which counsel for appellants say the sale ought to have been, and was attempted to be, made. Article 3 of chapter 86 of the Revised Statutes regulated the proceedings for the sale of infants' real

estate, and article 5 of the same chapter, subject to the amendments of 1854 and 1858, regulated proceedings to sell land held by a married woman for life, with remainder to her children, or others interested. Section 3 required that the petition should be filed by the guardian of the infants, alleging that it was to the interest of the infant to have the land sold. and the guardian was also required to execute bond, etc. Article 5, in regard to land held by married women for life, with remainder to their children, provided that such land could be sold on the petition of husband and wife, making all interested parties to the action, the trustees, if any, to be before the court. The act of 1854 provided that no order of sale shall be made except upon abundant proof to the court that the sale and reinvestment will be beneficial to all interested in the property, and upon children, if any, being made parties to the proceeding. Section 2, article 5, chapter 86 also provided that sales of land and slaves held in trust might be sold under the provisions of chapter 86, variant from the provisions in the deed, and the proceeds invested, but all persons interested must be made parties to the proceedings.

The statutory guardian, or the trustee of the infant, having the custody of his person or the control of his estate, and invested with no other rights, or with the naked title to the estate without the power to sell; or when the trustee, with the power to sell, proposes to sell for the purpose of diverting the trust, in all such cases the proceedings for sale, or for sale and reinvestment, are regulated by statute; nor can the guardian, trustee or chancellor dispose of the real estate except in the manner pointed out by the statute. So if a joint tenant, or tenant for life, who desires to sell land in which the infant is interested, where there is no power of sale conferred by the deed, the statutory remedy must be followed in order to pass the title of those laboring under disability, and in all such cases the judgment, so far as it affects those under disability, is void unless they are made parties to the proceeding.

Have these statutes or the rule announced any application to trust property, where the trustee is not only invested with the title, but with the express power to sell and reinvest? That the trustee in this case had the power to sell, on the request of Mrs. Walker in writing, without calling on the chancellor, is

conceded. He accepted the trust, with the right reserved on the part of the mother, who, out of her own estate, had created the remainder interest for her children, to demand a sale, and when the trustee thought it was to her interest, not the interest of her children, it was his duty to make the sale and invest the proceeds, with the right to decline to execute the trust, and to require a petition in chancery to be brought, asking a sale and reinvestment, and on such a petition filed against him the chancery court shall order the sale and make the investment, so that James B., the trustee, is protected from all liability. The provision that the trustee should be made a party, if omitted from the terms of the trust, would not have dispensed with the necessity of having him before the court. The trustee was evidently unwilling to assume the responsibility of determining when the interest of the life tenant required a sale, and, therefore, they agreed that the chancellor should sanction their joint action as to the propriety of the sale.

This agreement did not, however, confer a jurisdiction on the chancellor that he could not have exercised without it, and the agreement alone can not be looked to as giving the jurisdiction. There is nothing in the statutes, or any of them, prohibiting parties from creating such a trust and investing the trustee with the title and the power to sell, and if he declines to act or execute the trust the chancellor has full and complete power to execute it; and the provision in the trust deed that the chancellor might administer the trust, and not the trustee, was a mere statement of the power the chancellor had, regardless of the deed, and of the right of the beneficiary to apply to the chancellor in the event the trustee refused to sell.

What is this trust, and for whose benefit was this sale to be made, by its express terms? The mother, Mrs. Walker, owned the fee. It was her general estate. She desired to invest the title in a trustee to herself for life, with remainder to her children, with the express power reserved to have it sold when she requested it in writing, when it was to her interest, or when the trustee deemed it to her interest, and have the proceeds invested and held as under the original deed. The trustee declined to exercise the entire responsibility, as he had the right to do, both under the law and by reason of the terms of the

trust. She then applied to the chancellor, asking him to execute the trust, alleging that it was to her interest, and that she had made the request in writing of the trustee, and he had declined to sell, further alleging that the land was unproductive, and did not yield a support. The trustee, who is made a defendant, answers and admits that he required the petition to be filed; that the real estate is unproductive, yields but little and is insufficient for plaintiff's support, and ought to be sold; and not only so, but asks the sale and reinvestment. The parties who had the undoubted right to sell, without going into a court of equity, saw proper to ask the chancellor to make the sale and reinvestment, and for that purpose admitted that the beneficiary, who had the right to have the land sold, had taken all the steps out of court that were necessary to compel the trustee to execute the power, and although she had made the request in writing, and the trustee agreeing that it was to her interest to sell, because they have gone into a court of equity asking this sale the proceeding is said to be void, when it is manifest that the chancellor has done in court only what the parties could have done out of court, without consulting him or the children. The trustee and the beneficiary, if the views of counsel for the appellant are to prevail, have by going into a court of equity destroyed or canceled the plainest provisions of the trust deed, and one to which the mother looked at the time she created the trust as securing to her a comfortable support and maintenance during her life. When creating the trust, looking to the land or its income for her support, she evidently believed, or was advised, that it might not prove sufficiently productive for that purpose, and the provision was inserted requiring the trustee to sell when it was to her interest and when she required it in writing, or he might require an action to be instituted in a court of equity, asking the sale and reinvestment; and when she goes into a court of equity it is maintained that it is not her interest that is to be consulted by the chancellor, but she must make it appear, by abundant proof, that it is to the interest of the remainderman that the land should be sold. The trust is canceled in the endeavor to enforce it, and although this was your own estate, out of which the trust was created, you had no power to reserve, by an express provision of that instru-

ment, the right to sell when your own interest required it, unless the sale was made out of court; and as you have asked the chancellor to sell, you must allege and prove that it is to the interest of others that it should be sold, as well as to your own interest. The legitimate results of such an argument are to prevent the execution of trusts with the power to sell real estate, where infants and married women are interested; in the event the trustee declines to sell, as it necessarily follows, if counsel be correct, that a resort to a court of equity requires the sale to be made under the provision of the statute, and they must be followed, and no such trust as the one before us can be enforced by the chancellor. The fact that by the trust deed the land is to be sold by the trustee, where the interest of the life tenant required it, is of itself convincing that this character of trust is not within the statutes cited, or affected by them. It is also urged that the trustee, having a discretionary power to sell, can not delegate that right to some one else. No such authority was delegated in this case. The beneficiary entitled to have the sale made had united in the request. The trustee authorized to make the sale united in the same request, both of the parties by pleadings, sworn to in open court, asked the chancellor to exercise his discretion as well as their own, and where they all concur that a sale is to the interest of Mrs. Walker, not the children, it is insisted that the title did not pass, because the chancellor was without jurisdiction, but at the same time conceding that Mrs. Walker and the trustee could have made the sale, even after the judgment was rendered. The life tenant and the trustee both say to the chancellor, we desire you to sell, because, in our judgment, the interest of Mrs. Walker requires it, the one making the statement in her petition, the other in his answer. The discretion is directly exercised by the life tenant and the trustee, and because the chancellor concurs the sale is to be held void. No discretion or confidence is or was delegated by the trustee, and it was for his protection alone the chancellor was called on to aid in the execution of the power. Mrs. Walker had the right to have the trust enforced, not the land sold as infants' or married women's estate, and the fact that her counsel might have supposed he was proceeding under the statute did not affect the title of the purchaser, if the chancellor had

the jurisdiction to sell without having the infants before him. Counsel filing the petition could not have supposed he was proceeding under the statute, as it is not pretended that there was a compliance with any of the provisions of the statute; and if such was his purpose it can not affect the question here. The application to the chancellor did not affect the rights of the parties under the deed, but the trustee had failed to execute the trust, and in this light he is termed in the original opinion a recusant trustee, and properly so, as the fact existed upon which depended his right to sell, viz., the necessity for an investment for the better support of the life tenant. She was without remedy except to apply to the chancellor; and the argument that the trustee might require an action in equity against him neither diminished nor enlarged the jurisdiction of the chancellor.

Courts of equity, by the rule of the common law, permitted the exchange and reinvestment of the estates of those under disability, and particularly estates of infants, but, says Story, "when the court directs any such change of property it directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state." (Story's Equity, volume 2, section 1757.) Sales of infants' real estate and estates of married women in trust, etc., are now regulated by statute, but no provision of the statutes referred to affects the jurisdiction of the chancellor to enforce trusts or to direct the execution of a power. The inherent and original jurisdiction of a court of equity over trustees and the estates held by them in trust still exists, and has never been repealed or modified by the statutes in regard to the sales of property owned by infants, femes covert or others under disability except in cases where the trustee has no power to sell, or where he proposes by the proceedings instituted to change the character of the trust. This court maintains in the opinion that it is the mere enforcement of a trust where the power to sell existed independently of the chancellor, and the trustee, willing and desirous of selling, uniting with the only party who, by the terms of the trust, had the right to demand a sale, is asking the sale, the title passed to the purchaser. A power to trustees to sell an estate upon some specified trust, where the

trustee refuses to execute the trust, the chancellor, upon bill filed by the parties in interest, will decree its execution by the sale of the estate for the specified trust. (2 Story's Equity, section 1061; Perry on Trusts, section 248.) It is asked: What becomes of the responsibility of the trustee? He ceases to be responsible, as in any other case, when he declines to execute the trust and the chancellor administers it for him. The exercise of such a power is a branch of equity jurisdiction as ancient as the court itself, and to question it at this day is to deny that a trust can be created. The distinction between this character of trust and proceedings to sell infants' real estate and that of married women held in trust under our statute, so far as it affects the question of jurisdiction, has been constantly recognized by this court. There is no doubt as to the manner in which proceedings are to be had under the statute for the sale of land held in trust for married women or otherwise, but it will not be controverted that parties owning an estate still have the right to convey in trust, so as to confer the power of sale without the aid of the chancellor, and also to provide that when the interest of the life tenant requires it the trustee shall sell without consulting those in remainder; and where such a power is given an application to the chancellor, who has a supervisory power over all trusts, to make the sale can not affect the rights of the purchaser, if all who are entitled to have a sale by the terms of the trust deed are before the court. It is idle to say that parties who have full power to sell out of court, by reason of the trust, lose all that right by uniting with the chancellor in administering it.

Has this court recognized such a supervisory power in courts of equity regardless of these statutes? In the case of O'Bannen v. Musselman, 2 Duvall, 523, this court said "that chapter 86, article 1 of the Revised Statutes, in reference to sale of infants' real estate, was not intended to apply to deeds containing a power of sale." It was also said in the same case that the act of February, 1865, directing what proceedings were to be held for the sale of remainder interests and the investment of the proceeds, was intended to allow such sales where no power of sale was conferred by the deed. Also chapter 47, section 17, Revised Statutes, forbidding the alienation of a mar-

ried woman's separate estate, did not forbid the alienation by a trustee under an express power." That case involves the question only as to whether the trustee could execute the powers conferred by the deed, and sell without asking the chancellor. This court further said: "We have been referred to no statute forbidding the execution of such a trust, but the tendency of legislation has been to rid such conveyances of our statutory enactments, and leave them to be governed by the rules of equity jurisprudence." In that case Musselman was the donor, and the deed authorized the trustee to sell by the consent of himself and wife in writing. Suppose Musselman and wife had gone into a court of equity alleging that they had made the request of the trustee in writing, and he had declined to sell, and asking that the trust be enforced and the proceeds invested, and the court had so ordered, is there an enlightened chancellor who would hold that the purchaser was without title because the chancellor had no jurisdiction to sell, as the statute was not followed by making the parties who had an interest in the trust (but no voice in the sale) defendants to the action?

Again, in the case of Allen v. Graves, 3 Bush, 491, a case going perhaps further in recognizing the jurisdiction of the chancellor than any other case, and certainly to a greater extent than the chancellor has gone in his judgment in this case. The trust fund in that case had been invested in real estate and both infants and married women were interested, the trustee being without power to sell (none having been conferred by the deed, applied to a court of equity for a sale and reinvestment. The trustee sued as the next friend only of the infant. The latter was not even a defendant. The appellant, Allen, purchased the land under the judgment, but refused to pay the purchase money, insisting that the statute in regard to the sales of infants' real estate and married women had not been complied with. This court said: "Had the sale been authorized by article 3 of the Revised Statutes, chapter 86, a non-conformity with its provisions might subject the appellant's title to hazard, but the authority of that statute was not necessary in this case for fulfilling a trust. For effectuating the trust most safely and beneficially the common law authorized the trustee, with the sanction of a court of equity, to reinvest,

and this is just such a case as is recognized by the act of 1858." In the last-named case the trustee, without any power to sell, and suing as the next friend of the infant, and without any other appearance, proceeded by petition to have the land sold, without the execution of a bond, the appointment of commissioners, or conforming in any way to the statute in regard to the sale of infants' real estate, and yet the purchaser was compelled to accept the title. Where the parties are in court, who have the power to sell by the express terms of the trust, asking the sale, and who could sell without going into a court of equity, the title of the purchaser is as valid as if the parties had united in the deed with the commissioner, or had made the conveyance without asking the aid of the chancellor. As said by the lord chancellor in the case of Hearn v. Mogarolly, 1 Busby & Nasen's Chancery: "Can it then be said that a party who, out of court, does admittedly so represent the estate, for the purpose of sale and mortgage, is not, in this court, a fit representative of the estate for a similar purpose?" In that case it is true the trustee was a defendant and the creditor attempting to subject the trust estate. The question was whether the person to whom the first estate of inheritance was limited was a necessary party to the action.

It is plain, as contended by counsel, that mere trusts or powers that are purely discretionary, to be executed at the will and pleasure of the trustee, when he deems it to the interest of the parties, can not be enforced in equity, where the trustee is resisting or his discretion controlled by the chancellor. This doctrine is elementary, but where the trustee and those who have the right to unite with him ask the concurrence of the chancellor in the execution of the power the administration of the trust is brought within his control by the consent of the parties. Not that it gives jurisdiction, but it confers upon the chancellor the power to administer a trust that he would not have exercised without the consent of the parties. If the chancellor had enforced the trust against the consent of the trustee and sold the property the title would have passed to the purchaser upon the confirmation of the sale. The judgment would have been erroneous, but the title valid, because of the original and inherent jurisdiction of a court of equity over

trust estates, the subject-matter being within the jurisdiction of the court. In this case, however, it was the duty of the trustee to execute the power, and while he might decline, the chancellor had the undoubted right to administer it for them, when they were both asking it and alleging that the necessity for the sale existed. At law the right of the trustee invested with the title to sue in his own name in reference to the trust property is a rule well understood, and in a court of equity the rule is that all persons who are beneficially interested must be made parties where the trust property is affected. What is the better practice is not the question here, but is the sale void because those entitled in remainder were not parties? The only parties entitled to be heard upon the issue made were before the court, viz., the life tenant and the trustee. If it was necessary to show that a sale was to the interest of the remainderman, they were indispensable parties, but their mother and the trustee say that by the terms of the deed they had no voice in the sale, and that to consult their interests would require the life tenant, who has invested the proceeds by reason of a trust of her own creation and out of her own estate, to sacrifice her interest for that of the remainderman, thereby changing the object, terms and purpose for which the trust was made and the power to sell given. It is plain that the jurisdiction of a court of equity to enforce or have a trust of this sort executed remains unaffected by the statutes referred to. All the parties are before the court, who, by reason of the trust deed had the right to demand a sale, asking that the sale be made. If Mrs. Walker and the trustee could sell out of court and pass the title without consulting those in remainder, the fact that they consulted the chancellor, and not the remainderman, does not invalidate the sale. The only ground for equitable relief is that these appellants were not parties to the action in equity for the sale made by the chancellor. Their legal or equitable demand is based upon no other ground. What appears in the proceedings instituted by Mrs. Walker and her husband against the trustee to sell this land:

1st. That Mrs. Walker owned the estate in fee, out of which the trust was created.

2d. That she reserved the right in the conveyance to have the land sold and the proceeds invested by the trustee when she requested him in writing to do so, and the trustee thought it to her interest, with the privilege on his part to require a petition in chancery to be brought for that purpose.

3d. That Mrs. Walker made the request in writing of the trustee and he required the petition to be filed, but admitted that the necessity existed as provided in the deed for the sale, and united in asking the chancellor to make it.

4th. The life tenant, Mrs. Walker, after the sale and in the same proceeding, filed her petition against the trustee, claiming that by the trust deed she was entitled to the interest on the money for her support, and it was necessary for that purpose, and the interest was directed to be paid over to her.

5th. After the death of Mrs. Walker John Burk qualified as the guardian of the infants and filed his petition in the same case, alleging the sale of the land, and the fact that he was the guardian, and asking to withdraw the money. He was permitted to withdraw the money for the purpose of investment, and failing to make the investment was proceeded against by suit, and hence the suit of the remaindermen, who were his wards, to recover the land, as they had not recovered the proceeds.

It was not deemed necessary in the opinion delivered in this case to present more of the facts of this record than would enable the court to distinguish between enforcing a mere trust by a court of equity, on the application of the parties who had the right to have it executed, and sales by the chancellor of the estates of infants and married women, whether held in trust or otherwise, under the statute. It is urged in argument that the court in the opinion has assumed that the trustee was derelict in his duty, and, therefore, the chancellor had the power to execute the trust or have it executed on the application of the life tenant, when it appears the trustee had the right to call on the chancellor or to require the life tenant to do so. This, as already said, the trustee had the right to do regardless of that provision in the deed, and the opinion properly proceeds on the idea that the trustee was unwilling to do what his duty required he should do. A concise statement fo

the case was all that was necessary in applying the rule of equity that necessarily controlled it, the court deeming it useless to respond to the many suggestions made by counsel on the hearing.

We have given this case a patient investigation, its many pages, as well as the numerous and extended arguments of counsel, both oral and written, have been again considered, and we have as yet failed to discover, either from the pleadings, proof or arguments, any equity whatever in appellant's claim. The parties entitled to have the land sold have caused it to be sold. The purchaser pays into court $85,000, that the statutory guardian of the infants (now appellants) withdraws by an order of court, and then becomes insolvent, and it is now maintained that the purchaser must surrender the land and look to the insolvent guardian for his money. There is neither law, justice nor equity in the demand. We have only elaborated the views expressed in the original opinion, in which we fully concur, and the petition for a rehearing must be overruled.

W. P. D. Bush for appellants.

Barnett & Noble for appellees.

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## LOUISVILLE BRIDGE CO. v. CITY OF LOUISVILLE.

(Filed May 26, 1883.)

1. Power of State to tax an interstate bridge—The jurisdiction of the State of Kentucky extends to the northwestern shore of the Ohio river, and the State may tax every species of property within that jurisdiction, unless such taxation amounts to a discrimination in favor of local as against ultra-State products or to an obstruction of the free navigable waters within its limits. A tax imposed by the State of Kentucky on a bridge extending across the Ohio from the Kentucky to the northwestern (Indiana) shore is lawful, and is not an attempt to regulate commerce between the States.

2. Power of city to tax an interstate bridge—But the city of Louisville has no power to tax the bridge, although the city's limits extend to and over the bridge. A municipality has no power to tax property not benefited by the city government.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

The city assessor of Louisville, in August, 1876, without notice to the Louisville Bridge Co., assessed for taxation so much

of its right of way and bridge improvements thereon as lies between the north line of the Louisville and Portland Canal, and low water mark on the northwestern shore of the Ohio river.

The assessment was for back taxes alleged to be due for the years 1874, 1875 and 1876. The assessor fixed the valuation each year at $750,000, but no opportunity of a review of the assessments was alleged to have been given the company by keeping the assessment rolls open the requisite length of time and giving notice thereof, as required by law.

Upon this assessment the city of Louisville brought this action in equity against the bridge company to subject its right of way and bridge over the water in the Ohio river to the payment of the taxes for those years and the penalties for the nonpayment thereof within the statutory periods. The city recovered the sum of $51,975, the amount of the taxes, and the bridge company has appealed from the judgment.

Its counsel insist that the judgment is erroneous because the bridge and right of way are not subject to State or municipal taxation. Many other questions upon the pleadings, ordinances, manner of assessment, citation, etc., are discussed and urged with force and plausibility, and we might say as to some of them unanswerably, but it is unnecessary to decide them, in view of the radical effect of one of the two main questions relied upon by the appellant, which we will proceed to discuss.

It is contended that appellant's bridge and right of way, described in the petition, are not subject to the taxing power of the State of Kentucky, because—

1st. Of the 3d clause of section 8, article 1 of the Constitution of the United States, which provides that congress shall have power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2d. Of the 11th section of the compact with Virginia, which declares "that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United

States and the respective jurisdictions of this Commonwealth, and of the proposed State, on the river, as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river."

The jurisdiction of the State of Kentucky over that part of the Ohio river which marks her northwestern border to low water mark on its northwestern shore has been so often considered that we had thought the question one of authority, but able and learned counsel, whose views are entitled to consideration, contend that the question presented by this record is new and has never been settled adversely to their position, and we, therefore, feel that it is our duty to dispose of the questions by a review of the history, legislation and authorities which support the principles applicable to it.

In 1779 Virginia opened a land office, but prohibited the location or entry of any land within her then charter limits lying to "the northwest side of the river Ohio."

This prohibition must have been made in contemplation of the cession of that part of her territory to the United States.

Preliminary to the cession Congress, on the 6th day of September, 1780, passed a resolution recommending to "the several States, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union."

On the 2d day of January, 1781, Virginia yielded to the Congress of the United States, for the benefit of the said States, "all right, title and claim" which she had "to the territory northwest of the Ohio river," subject to certain conditions. Congress, by an act of September 13, 1783, stipulated the terms on which the United States agreed to accept the cession of the territory named. On the 20th day of December of that year, although the terms on which congress agreed to accept the cession did not "come fully up to the propositions of Virginia," that State accepted the terms of congress, and by an act of her general assembly authorized her delegates in congress, by proper deeds or instrument in writing, to convey unto the United States all her right, title and claim "as well of soil as jurisdiction" to the territory lying "to the northwest of the

Ohio river." And in pursuance of that authority Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, on the 1st day of March, 1784, executed a deed of cession from Virginia to the United States conveying the soil and jurisdiction of that territory.

Thus Virginia parted with that magnificent "tract of country" embraced by her charters of 1606, 1609 and 1611-12, granted by James the first of England; and thus the United States became invested with title to its soil, and jurisdiction for the benefit of the States, including Virginia.

On the 13th day of July, 1787, Congress passed "an ordinance for the government of the territory of the United States northwest of the river Ohio," in which it was declared "for the prevention of crime and injuries the laws to be adopted or made shall have force in all parts of the district," the territory then being one district; that "no tax shall be imposed on lands the property of the United States;" that "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor."

The compact between Virginia and Kentucky was made on the 18th day of December, 1789, more than two years after the passage of the ordinance of congress establishing the northwest territorial government, and subsequent to the adoption of the Constitution of the United States.

There is nothing in any of the acts, either of Virginia or the revolutionary congress, relating to the cession of the northwest territory to the United States, which conveys, surrenders or affects the jurisdiction of the State of Virginia over the bank, bed and waters of the Ohio river to low water mark on its northwestern shore. The first mention that is made of the navigable waters leading into the Mississippi and Saint Lawrence, and of their character and use, is to be found in the 4th article of the ordinance of 1787, which referred only to such navigable waters flowing into either of those great rivers as laid within or flowed through the territory lying to the north-

west of the river Ohio as that territory so bounded, with the rivers embraced in it, was the subject of the ordinance, and alone conveyed by Virginia's deed of cession. It is true that the ordinance of 1787 was in furtherance of the prevalent sentiment of the country in favor of the free and common right of navigation of the Mississippi and the navigable waters flowing into it. But congress had no power then, under the articles of confederation or from the States, to regulate the navigation of interstate streams outside of the ceded northwestern territory, over whose soil and rivers congress had jurisdiction by the terms of the deed of cession.

And until the Constitution of the United States was established, delegating to congress the power to regulate commerce among the States, it had no such power over the rivers within the jurisdictional limits of the States. Therefore, the commercial clause of the Constitution, and the 9th section of the first article, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over another;" and the second clause of section 10 of said article, which says: "No State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with their construction by the courts, declare and explain the nature and extent of the jurisdiction of the United States over the Ohio and other navigable waters.

By the decision of the Supreme Court, in Handly's Lessee v. Anthony, 5 Wheaton, 374, the territorial limits of Kentucky were authoritatively held to extend to low water mark on the northwest side of the Ohio river, and her jurisdiction over the soil to low water mark was affirmatively settled.

That jurisdiction extends to all kinds of property situated in the Ohio river, such as islands or the right to the soil under the water, and there is no limit to its lawful exercise, except where jurisdiction and power has been delegated to the general government for specified purposes, and that of the State expressly or necessarily excluded.

It is said in the case of McCulloch v. Maryland, 4 Wheaton, 316, that all subjects over which the sovereign power of a State extends are subject to taxation, and the sovereignty of a State

extends to everything which exists by its own authority, or is introduced by its permission. And these principles are recognized in Gibbons v. Ogden, 9 Wheaton, 1, in which it was said the power of taxation is indispensable to the existence of the States, and may be exercised concurrently with the general government, but that there is no analogy between the power of taxation and the power of regulating commerce.

And there can be no necessary displacement or assumption of the power to regulate commerce by the States merely exercising the ordinary and essential power of taxation. For unless the taxes which may be levied for its own lawful purposes amount to a regulation of commerce in some way, either by obstructing or otherwise diminishing the free navigation of the waterways over which the commerce of the country is carried, or discriminating in favor of local and against foreign or ultra-State subjects of commerce, the taxing power of the State may be exercised upon all property within its limits which receives the protection of its laws. And the fact that property may be employed in a commercial venture or for commercial purposes does not sanction its exemption from the common burdens of taxation borne by other property, used in other pursuits of life, for the purpose of ordaining, maintaining and enforcing the laws.

Burroughs on Taxation, page 98, says the taxing power of the States may be exercised upon all property within their limits, upon the goods carried, or the instruments of commerce as property, and thus indirectly affect commerce. The text is in accord with numerous decisions. As the territorial jurisdiction of Kentucky embraces the right of way and the bridge over it, and power of taxation is so essential and general, where is the limitation to it which will embrace and exempt from State taxation this property? Its owner, the appellant company, was incorporated and created by authority of the sovereignty of Kentucky, and it was by her permission erected within her boundary, and is entitled and receives the equal protection of her laws, and, therefore, as we think, is subject to taxation as like property situated in any other part of the Commonwealth.

This bridge is not an agency or means employed by the Federal government to carry any of its powers into effect, but a public way over which commerce is carried, and which belongs to a private corporation having the right to charge for its use. The bridge is a public convenience, but it constitutes no branch or part of the general government, and is not used by it to regulate commerce. For the purpose of protecting the free navigation of the Ohio and other inter-state streams congress adopted certain rules by which bridges may be so erected over them as not to obstruct their use, but it does not follow that because congress, under its power to regulate commerce, prevents such bridges from obstructing navigation that it is employing them as a means of regulating commerce, or that they are necessary or proper to that end any more than their use by those engaged in commercial pursuits renders it an agency in the regulation of commerce among the States in the constitutional sense. The appellant's counsel constructed their argument upon a misconception of the purposes for which the bridge was built and is used. The cases of Thompson v. Pacific Railroad Co., 9 Wallace, 590; Railroad Co. v. Pemiston, 18 Wallace, 29, settles the doctrine that, although railroads, telegraph lines, manufacturing establishments and property of corporations are used and employed by the government to transport its mails, troops, munitions of war, etc., used in carrying on the commerce of the country, they are liable to contribute to the revenue of the State. Whatever may be the jurisdiction of the States which possess the opposite shore of the Ohio river, derived from the compact with Virginia, to which they were not parties, it does not extend to the soil covered by the water of that river at its lowest stage or to its islands or southern shore. Nor does the compact impose any duty upon or impart any power to those States to protect property located in or across the river and within the territorial limits of Kentucky, as declared by the Supreme Court. The subject-matter of the eleventh section of the compact is the use and navigation of the river Ohio, and the concurrent jurisdiction of all the States along its shores, was provided with reference to that subject, and to insure to them the equal enjoyment of the free use and navigation of the river, which was

a recognition and confirmatory of the rights which they enjoy under the Constitution that went into operation before the compact was made.

Not a decision can be found where the jurisdiction of the States lying to the northwest of the Ohio, and opposite Kentucky, has been held to extend to any island, bridge or right of way south of low water mark on the northwestern shore. Nor has any of those States, by legislation, claimed such jurisdiction or adopted appellant's construction of the eleventh section of the compact.

As a matter of history, it is known that those States have exercised merely police powers over persons and property along their shores when crafts were attached to them above low water mark.

This construction by themselves of their jurisdiction over the waters of the Ohio, the long and undisturbed acquiesence in its correctness, and the actual territorial limits of Kentucky, to the full extent of which she has, since her admission into the Union, exercised original exclusive jurisdiction over persons and property for every governmental purpose, leave no room to doubt the constitutional sovereign power of the State of Kentucky to control and tax the appellant's right of way and bridge.

But, although Kentucky has the power to tax this property for revenue purposes, the claim of the city of Louisville to tax it for municipal purposes rests upon a question of constitutional and legislative authority which, before it can exist in any case, must be preceded by the right of the State to exercise governmental jurisdiction over the subject sought to be taxed, and which can not be exercised in taking private property for public use without just compensation. The right to tax presupposes governmental benefits, and in case of the exercise of the power of taxation by a municipality there must appear, as said by this court in the case of Courtney v. Louisville, 12 Bush, 421, "both benefits actual or presumed, and a town or city population on or near the land creating a necessity, or at least rendering it not unreasonable that the municipal government should be extended over it."

In this connection the court said if the land "is not near enough to such population to require municipal government,

and the property has not been laid out into lots and could not be profitably so used, it ought not to be taxed for city or town purposes." The cases of Cheaney v. Hooser, 9 Ben Mon., 330, and Covington v. Southgate, 15 Ben. Mon., 491, support the opinion, and lay down and discuss the general principles applicable to the subject.

The agreed facts show that the bed of the river, over which the part of the bridge sought to be subjected to municipal taxation is erected, can not possibly be laid off into town lots or streets, and that the city of Louisville, whose corporate limits include the Ohio river to low water mark on the northwestern shore, has no right, if it were physically possible to lay out the bed of the river into lots or extend its streets into it, because that would obstruct its free navigation and appropriate the river to purposes which nature never intended, and the corporate limits of the city were not intended to effect. The appellants can never use their right of way as city property, and can not receive any profit from it merely as such. It also appears that the municipal government of Louisville does not light the bridge with gas or lamps at night; it furnishes no police force for its protection from the city population, and in fact performs none of those acts necessary and usual in protection of property which requires municipal government. It is true on one occasion the city's police, in conjunction with the militia, were called out to protect the bridge from a mob organized within its own limits, but this was not because the bridge was taxable city property, but because it was within the State of Kentucky, and entitled to the protection of her laws, and furnishes clear proof by its exceptional occurrence of the construction which the city authorities placed upon the character of this property.

It is not sufficient to authorize municipal taxation to show that the bridge was built within the corporate limits of the city, for the corporate limits may be, and in this instance are, larger than the taxable boundary of the city. At the time the bridge was built the real estate, the bed of the river, could not be subjected to city taxation, and it remains exempt from that power. If, therefore, the appellee's claim to tax the bridge be adopted by the court the anomaly in law and to common sense will appear, that immovable and permanent buildings

erected upon the soil, and considered in law as a part of it and as real estate, may be taxed, although the soil and all beneath it and the use of the waters which flow over it are constitutionally exempt from municipal taxation. This rule can not be logically applied to permanent buildings on dry land, and it will not be adopted as to buildings erected on lands covered by water.

If, as suggested, because the bridge would never have been built but for the proximity of the city, it may be taxed, then every line of railroad passing through the city which was an inducement to its location may be subjected as far beyond the population and necessity of municipal government as the legislature can be induced to extend the corporate boundaries of the city. So on the same principle so much of all the wharves and structures that may be built out into the river beyond low water mark from the Indiana shore would be subject to city taxation. The ferry boat owned by citizens of Indiana tied to her shore at the lowest water would be subject to assessment because they might never have built it but for the city of Louisville, which furnishes them the life of their business. If all property is to be taxed because it is profitable to own by reason of the patronage of the city, then we can see no escape for suburban property which, it is well known, gradually declines in value as its distance from the city's population increases. Where then would the supposed corresponding benefits of the city's patronage cease? To answer the question would be the ceaseless work of litigation, fomented by unnecessary extension of municipal boundaries for the embracement of taxable subjects.

The necessity for extending the municipal government over the river was not to protect the property on the river, as contended by appellee's counsel, but to catch fugitives who commit offenses in the city of Louisville and flee across the river to get beyond her jurisdiction. The extension of the boundary was proper on account of this police necessity, but the object of the legislature in making the extension of the city's boundary for the protection of her citizens and property from criminals ought not to be misinterpreted and made the pretext of unjustly taxing property situated beyond the population of the

city, with neither actual nor presumed benefits from its municipal government, and not susceptible of ever becoming a part of the city so as to be near to, occupied or surrounded by its population residing on lots adjoining it. It is not enough either that the bridge is a "very valuable property" to subject it to this long-delayed assertion of the municipality taking power over it, which, had the city authorities believed to exist, it would have been insisted upon long since. While mere delay would not of itself bar a recovery, it throws considerable light upon the nature of this right of way and bridge and the relationship which they bear to the population, government and duties of the city.

If the 6th section of the act of March 8, 1871, was intended to embrace the way and bridge described in the petition as subject to municipal taxation, it is to that extent unconstitutional and void.

Wherefore, the judgment is reversed and cause remanded, with direction to dismiss the petition.

T. L. Burnett and Lane & Harrison for appellee.

W. Lindsay, I. & J. Caldwell and Winston, Bullock & Anderson for appellant.

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## SHERLEY, &c. v. SHERLEY'S EX'OR, &c.

(Filed June 9, 1883.)

1. Ill-will of testator toward grandfather of disinherited heir competent—While the ill-will, hatred, or the exhibition of violent passions by a person usually good-humored, do not of themselves constitute insanity, they are often the manifestations of mental derangement and evidence of their existence in the breast of a testator against the maternal grandfather of contestants, should be left to the jury trying the issue of testator's sanity.

2. Reason assigned for inequality between devisees—It is erroneous to instruct the jury that if they believe the cause assigned by testator for the inequality in the will was true, then they must consider that the testator made the inequality for that reason alone.

3. Proper mode of instructing jury as to inequality between devisees—If the fact of inequality between devisees is singled out and the jury is instructed that the testator has the right to make such inequality, then they should also be told that any gross inequality in the will requires evidence that it was the act of a rational and clearly disposing mind.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Hargis.

After the probate by the county court of two papers, dated January 7, 1879, purporting to be the last will and testament of Capt. Z. M. Sherley, deceased, on appeal to the court of common pleas they were sustained as such by the verdict of a jury, and from the judgment on the verdict the contestants appeal.

At the time the papers were signed the deceased had a wife and three sons living, and one son dead, who left only two children, the contestants in this case.

To these grandchildren the contested papers purport to bequeath the sum of $10,000, to be held in trust for twenty years, the accumulating interest to be added to the principal by trustees, who are to act without security, and disposing of the remainder of his estate, amounting to three or four hundred thousand dollars, between his wife and three sons in something like equal proportions.

This apparent inequality between the living sons and the children of the dead son were relied on by contestants to show incapacity and undue influence, which they contend was shown by it in connection with other evidence tending to prove that John C. Sherley tried to get his father to make a codicil affecting the appellants, and influenced him to remove from his share the trusts imposed by a former paper, alleged to be a will, and which the draftsman was directed to insert in the contested papers; that various material changes in the disposition of his property and the appointment of appraisers, and the nonrequirement of surety of the trustees designated for appellants, were inserted at the suggestion of the draftsman; that the deceased had suddenly, and without sufficient reason, contracted violent prejudices against the maternal grandfather of the appellants, and indulged the suspicion that he was trying to get hold of their property, notwithstanding he wished the deceased to become their guardian himself; that those prejudices were in part transferred to the appellants; that the discrimination in the papers offered for probate was contrary to his former expressions and purpose that the appellants should have their father's full share, and that when he executed them he was greatly diseased from cancer of the stomach, that had

been assailing him from an unknown period, and which so impaired his physical and mental faculties as to render him incapable of making a will or resisting the undue influence of others.

This evidence was in conflict with that adduced by the propounders, who insist that it is fully explained and overturned.

The doctors disagreed as to the effect of cancer of the stomach upon the mind. Some of them testified that it rendered the mind brighter, and others that it impaired it, each giving the stages of its ravages wherein he conceived it to affect the mental powers. Other witnesses disagreed in the opinions they expressed as to the mental capacity of the deceased.

We intimate no opinion as to the side upon which the weight of the evidence rests, because under the law, as it now exists, the verdict of a jury in a will case has the same effect as the verdict of a jury in other civil cases. And only where there is no evidence to support a verdict rejecting a paper executed according to the forms of the statute will this court upon reversal order it to probate. In cases like the present, the verdict being in favor of the paper, our province is to ascertain whether thre is evidence on which a different verdict might be made by a jury, and, if so, whether there was any error of law committed at the trial in giving or refusing instructions, or in admitting or rejecting evidence. In looking at the evidence the question for this court is not whether the verdict is palpably against the evidence or supported by it, but whether, if the verdict were otherwise, there would be any evidence on which to base it. As the testimony is conflicting, and that offered by the appellants is sufficient to sustain a verdict in their behalf, if uncontradicted and unexplained, it becomes our duty to examine the instructions and determine their legality.

The appellants contend that the prejudices and hatred of the deceased to their grandfather, A. O. Brannin, amounted to an insane aversion to him, on which rested mental delusion with regard to them that caused the discrimination against them. The court instructed the jury by its fifth instruction as follows:

"The jury are instructed to disregard all the evidence in reference to the ill-will, prejudice or hatred of the testator toward A. O. Brannin, the maternal grandfather of the con-

testants." To this, as well as the other instructions given, the contestants objected and excepted.

While ill-will, prejudice, hatred, or the exhibition of violent passions by a person usually good-humored and affable, such as the evidence tends to portray Capt. Sherley, do not of themselves constitute insanity, they may be, and often are, the manifestations of mental derangement, and evidence of their existence with reference to persons so nearly related to those naturally entitled to his bounty as the maternal grandfather, against whom he entertains suspicions which might affect the disposition of his property, should be left to the jury to determine whether they result from naturally ungovernable passions, or were produced by provocation, or were the indication or sign of a decaying or decayed mind, where the issue of sanity or insanity is being tried by them. (Tudor v. Tudor, 17 Ben. Mon., 395, close of page.)

The fifth instruction was, therefore, erroneous, and took from the jury the explanation of a portion of the acts and words of Capt. Sherley, which related to the appellants as well as to their grandfather, and which may have, in the opinion of the jury, materially influenced Capt. Sherley in discriminating against them, by reason of insanity produced by these or other causes.

In the fourth instruction the court instructed the jury "that, if they believe from the evidence that the cause assigned by the testator in the paper or will in dispute for the inequality between his children and his grandchildren was true, then they must regard the testator as having made that inequality for that reason or cause alone." The cause assigned by the deceased in the papers offered for probate for the inequality was in substance that his son Lewis, the father of appellants, had stated to him that he did not want his children to have a large estate, and intended to make a will in such manner that they should receive about $10,000 each.

If the jury believed from the evidence that these statements in those papers were true, then it mattered not, under this instruction, what they believed as to Capt. Sherley's incapacity or the alleged undue influence, they were compelled in obedience to it to disregard such belief and conclude that Capt.

Sherley made the inequality for the reason or cause alone as found in the papers in dispute.

This can not be law. Although it may have been true that Lewis did not wish his children to have more than $10,000 each, and so informed his father, yet it does not follow that the papers in contest were not the product of an undue influence, incapacity or other causes.

The jury were the sole judges of the facts or causes which influenced the execution of the disputed papers, and should not have been so restricted in their consideration of the question.

As said by this court in Wise, &c. v. Foote, &c., MS. of February 1, 1883, 1 Ky. Law Rep. & J., 643, "influence obtained by flattery, importunity, threats, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection or obtained at one time or another."

And when such influence is exercised by one person over another it is not unreasonable to suppose that the most effective mode of concealing the operation is to cause the paper produced by it not only to read sensibly, but, if circumstances will permit, also to state on its face a truthful and plausible reason for its contents, whether sufficient or not in fact, hence if the jury be confined to the cause assigned in the paper for making it, if that cause or fact be true, then all that was necessary to render the paper valid, although it may have been the product of undue influence, was the insertion of a fact in it known to the person exercising the undue influence to be true, and prove that on the trial.

By the third instruction the jury were told that "the testator had the right to make such distinction between the objects of his bounty as he chose to do, if at the time he did so voluntarily and understandingly, was not controlled by undue influence and was of sound mind."

This instruction singles out the fact of inequality and guards it so that the jury might not give full weight to it.

This court, when it had the power to try both law and fact, said: "The testator had an unquestionable right to make such a will. But its apparent unreasonableness requires satisfactory evidence that it was the free and deliberate offspring of a rational, self-poised and clearly-disposing mind." (Harrell, &c. v. Harrell, &c., 1 Duvall, 204.)

Such a presumption arising from the fact of inequality is a disputable presumption, and always exists where gross inequality is unexplained by the statements of the document or by the proof itself, and is a legitimate concomitancy of that fact until such explanation is satisfactorily made.

Discussions and arguments of this character, to be found in the books when this court tried the facts as well as the law, were legitimate and belonged more properly to the domain of logic, and were not intended as expositions of guiding law to be given in the form of instructions to the jury unless they be told that gross inequality is accompanied by the presumption quoted above from first Duvall. Excluding therefrom the word "clearly," was the apparent ground of condemning an instruction on the subject in the case of Broaddus' Will, 10 Bush, 305. There, however, it was said:

"The statement of such an abstract proposition might be unobjectionable in an argument upon the fact of a particular case," but embodied in an instruction that it is misleading and calculated to divert the minds of the jury from the issue of mental capacity "to that of the inequality."

Hence we conclude if a limitation is imposed by an instruction upon the presumption, flowing from gross inequality, the breadth of that presumption should be also defined to the jury.

The issue to be tried by the jury is not the lawful right of a man to make a will and dispose of his property in his own way, but whether, having the right, regardless of their opinion, he has made a will when he had a sound and disposing mind, ungoverned by undue influence or fraud or duress, and according to the forms and requirements of the statute.

Therefore, the existence or nonexistence of these questions of fact are the only subjects upon which the jury should have been instructed in this case. Such instructions should, of necessity, embrace proper definitions of mental capacity, undue influence, duress or fraud, if any exists, and of the requirements of the statute.

We see no prejudice to the substantial rights of the appellants by the seventh instruction, for it is a less burden on them to show he had not capacity to do the several united acts therein specified than to demonstrate his inability to do any one of them, for it took more mind to do all than to do one of them.

If, therefore, he was shown incapable of doing them all, but if it appeared he knew his heirs or estate, the instruction authorized the jury to find for contestants.

The instruction was correct law, though inaptly drawn, and cast upon contestants the burdens only of showing his incapacity to do any of the matters enumerated as essential to testable capacity, according to instruction No: 2, given at appellee's instance.

The word "prevents," as used in instruction No. 1 given by the court, might imply to the mind of the jury physical force, and should not have been used. (Lucas, &c. v. Cannon, &c., 13 Bush, 652.) As we understand, testable capacity, as defined by the instruction in Tudor v. Tudor, 17 B. Monroe, 391, it is the ability of the testator to know his children, or the object of his bounty, and his estate, and to dispose of the same in a rational manner, according to a fixed purpose of the testator. That such capacity must exist without the officious or coaxing promptings of any one, and enable him to dispose of his property in a rational mode or manner, according to his own purpose.

In other words, he alone must have the capacity, without the necessity of aid from any other person, to comprehend or understand all or any of the essential elements of testable capacity which were approved in Tudor v. Tudor, supra.

The determination of the questions of law raised in connection with the instructions we have considered settles the points as to the improper exclusion of evidence offered by the con-

testants. Wherefore, the judgment is reversed and cause remanded, with directions to grant appellants a new trial.

On the 16th of June Chief Justice Hargis delivered the following modified opinion to the above:

For sufficient reasons the court refrains from expressing any opinion as to the question of credibility of the attesting witnesses to the papers in contest, and leaves that question open, in view of the new trial which has been ordered. The opinion to this extent is modified.

Wm. Lindsay, Isaac Caldwell, John Roberts and Horace C. Brannin for appellants.

James Speed, J. K. Goodloe, A. P. Humphrey and E. E. McKay for appellees.

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## CHATTAROI RAILWAY CO. v. KINNER, &c.

(Filed June 5, 1883.)

1. Repeal of chartered rights—Ad quod damnum—The special provisions of a railroad charter, authorizing it to condemn property in a certain mode, may be repealed, and the railroad brought under the operation of the general law.

2. The legislature may amend a previous act by regulating the remedy for enforcing corporate privileges so it does not impair the obligations of contracts. But here no contract existed with reference to the condemned land, as appellant had neither paid, secured nor tendered the price of the land, although it had entered on the land.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Hargis.

The special provisions of the charter of the Chattaroi Railway Co. authorized the condemnation and valuation of land for its right of way and construction by warrant, issued by a justice of the peace, and tried by jury in the county.

Pursuant to those provisions the appellant company caused the warrant to issue and a jury to be summoned, who assessed the value of the lands of the appellees, and the latter appealed to the circuit court, which decided that the justice had no jurisdiction to issue the warrant or preside at the trial before the jury, because the special remedy for condemnation provided

by the appellant's charter had been repealed by the general act of the legislature, approved April 11, 1882, prescribing "the mode of condemning land for the use of railroad and turnpike companies."

From the judgment of the circuit court the railway company has appealed, and assigned as error that the court erroneously held the proceedings should have been in accordance with the general law. Other assigned errors will not be considered, because the decision upon the error named will dispose of the case.

The general law prescribes a wholly different mode of condemnation from that provided by appellant's charter.

The questions, therefore, which necessarily demand our consideration are: First, whether the general law repeals the special remedy for condemnation of the citizen's property provided for by appellant's charter; second, does the charter of the company constitute a contract which can not be varied by an alteration of that special remedy?

It is provided in section 9 of the general act that "all acts, or parts of acts, in conflict with this act, are hereby repealed, including such special acts as may be passed at the present session of the general assembly."

The language of this section shows expressly an intention on the part of the legislature to repeal all former acts whether general or special, which are in conflict with the act of which said section is a part; and the clause which includes such special acts as were passed at the same session was added to prevent a constructive repeal of the general law by inconsistent provisions of charters that might be granted to corporations, and to avoid the effect of the rule that statutes enacted at the same session shall be construed as one act, so far as they relate to the same subject, unless the last is absolutely inconsistent with the first act, or expressly repeals it. There is no doubt, from the language used in the repealing section, that the legislature intended to adopt a uniform mode of condemning land for the use of railroads and turnpikes throughout the Commonwealth, and to break up and destroy the inconsistencies which prevailed in the special remedies provided by the numerous charters of corporations of that character.

As we understand the general notion of an inviolable contract with the State, arising out of the passage and acceptance of a charter, it must invest the corporation with an absolute right of property, or confer such authority which, when exercised, vests the corporation with such rights of property or interest as are of some appreciable value, and which, therefore, can not be taken from the corporation by subsequent legislation against its consent. But the legislature has the power to enact any subsequent or amendatory law which regulates the remedy for enforcing corporate rights and privileges, so it does not, under the guise of regulating the remedy, impair the obligation of a contract, or which only operates on the relations between the corporation and other persons before any contract between them has been concluded and interferes with no vested rights of the corporation. Before the appellant could become invested with title to the land of the appellees it was bound to make just compensation pursuant to legal proceedings before a court having jurisdiction. The mere fact that the appellant had entered and taken possession of the lands of the appellees, for which it does not appear that the appellant either tendered, paid or secured the sum assessed by the jury, is no performance of the conditions precedent and essential to the investiture of title to the land under the special remedy for condemnation provided by the appellant's charter. Vested rights can not be acquired nor contracts made by such acts and proceedings so as to justify the courts in protecting them as inviolable under the constitutional sanctions against their destruction or impairment. We do not think, therefore, that the appellant had any contract with the appellees at the time the general law was passed, nor was it possessed of any vested and immutable right to the remedy of condemnation prescribed by its charter which did not, with respect to that remedy, constitute a contract in the constitutional sense. It has been held by the Supreme Court, in Baltimore, &c., R. Co. v. Nesbit, 10 Howard, 395, that the State had the power, by legislative enactment, to grant a rehearing of cases of ad quod damnum after final judgment in a court of last resort, and before payment or tender of the valuation upon which the title vested, and that such retrospective laws were constitutional.

In the case of Calder and Wife v. Bull and Wife, 3 Dallas, 386, the same court decided that the State legislatures had authority to award a new trial or order proceedings, in the nature of an appeal or writ of error, after the commencement of litigation and even after final judgment, and that such laws were neither ex post facto nor violative of the obligations of contracts. If these authorities are sound, certainly the general act of the legislature, being in force at and before the commencement of these proceedings, is constitutional and within the legislative power.

Wherefore, the judgment is affirmed.

K. F. Pritchard and W. C. Ireland for appellants.

John W. Hampton for appellees.

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## LAWRENCE COUNTY v. CHATTAROI RAILWAY CO.

(Filed June 5, 1883.)

**A county has sufficient interest in the public highways to entitle it to bring an action in its own name against any one destroying the usefulness of such highways.**

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellant, Lawrence county, brought this action, by petition ordinary, against the appellee, the Chattaroi Railway Co., alleging that the defendant is a corporation created by an act of the legislature of this State, and so constructed its road as to occupy and destroy the usefulness of two highways, which the county had caused to be opened and made within its borders, and on one of which it had erected twenty bridges at a cost of at least $9,000 which had become wholly useless to the county and the traveling public by reason of the unlawful occupation and destruction of said highways by the defendant to the plaintiff's damage in the sum of $15,000, for which the county prayed judgment. The defendant demurred to the petition, first, because the plaintiff had no legal capacity to sue; second, because the petition did not state facts sufficient to constitute a cause of action. The court sustained the general demurrer, and the county has appealed.

On the first point, whether the county had sufficient capacity to sue, this court held, in the case of Christian County Court v. Rankin & Tharp, 2 Duvall, 508, that an action for the unlawful burning of the courthouse could be maintained in the name of the county as a quasi corporation owning the courthouse. The Civil Code, section 18, provides that every action shall be prosecuted in the name of the real party in interest.

When a highway is opened the lands over which it may be constructed or required to be condemned according to the provisions of the statutes, and the use of the land at once vests in the county for the benefit of the public and passes from the owners, who can not resume the use until it is abandoned or surrendered by authority of the county through its lawfully constituted agents. The common highways, as is alleged with reference to those named in he petititon, are generally made by the labor of hands allotted along their routes, and by the impressment of teams for which the county makes payment by appropriation and allowance at the annual court of claims.

The bridges, which may be necessary to the completion of the highways, are usually constructed by contract between the county court, through commissioners, and the builders, who are paid by taxation levied by authority of the county agencies. These bridges are often constructed at the cost of large sums. They are under the control of and are repaired by the county, which may for sufficient cause discontinue their use altogther. And we think the county is the real party in interest, holding, controlling and owning the highways and bridges of the county for the use and benefit of the public precisely in the same way as the courthouses, which are constructed and paid for just as bridges, i. e., by contract with builders, and their payment through the levy of taxes. Unless the county could bring an action to recover the value of the bridges and highways which may be tortiously destroyed there would be no remedy for a great wrong, and public property would be at the mercy of wrongdoers, curbed only by the restraining influence and power of indictment for a public nuisance, which is insufficient to afford full relief in such cases.

The nuisance might be abated and punished, but the destroyed property would not be restored or the value returned to the county.

In many cases it has been held that counties are quasi corporations, and can sue and be sued for many purposes. (Hampshire v. Franklin, 16 Mass., 87; Inhabitants of Lincoln County v. Prince, 2 Mass., 548.)

In the case of The Inhabitants of Springfield v. The Connecticut River Railroad Co., 4 Cushing, 68-72, it was held that the grant of land for one public use must yield to that of another more urgent, but an action could be maintained by a town within which lay a public highway, over and along which a railroad corporation, under a general grant of power, laid out and constructed their roads.

So it was held in Troy v. Cheshire R. Co., 23 N. H., 83, and Hooksett v. Amos Koyman Co., 46 N. H., 106. In the latter case the court held that a town has such an interest in the roadways and bridges, which it has erected for its public highways, that it can maintain an action upon the case against the wrongdoer for the destruction of such a roadway and bridge.

Speaking of the interest the original landowner held, the court said: "But while the highways exist the landowner has no ownership in the highway or bridge as such. He may own the soil subject to the highway. Nor has the indefinite body, termed the public, any ownership in the highway or bridge. * * * If neither the landowner nor the public have any ownership in the highway as such, there can be no other owner of it than the town."

And in the case before us, as the county erected the bridges and had the highways made, and it is its duty to allot hands to keep the roads in repair, and may maintain and preserve the bridges, it acquired an interest and ownership in the highways and bridges which is necessary to the performance of the duties and the exercise of the county in protecting such property, support an action against a mere wrongdoer, such as the appellee is alleged to be. We need not consume time to demonstrate that the unlawful and wrongful destruction of the highways and bridges constitute an injury for which the law gives a remedy. The allegations of the petition as amended

constitute a cause of action on the case for the damages to the highways and bridges described in the petition, and the demurrers, both general and special, should have been overruled.

Whether the appellee has any authority under its charter for occupying and destroying the highways named, and thereby rendering the bridges useless, we will not intimate any opinion, as that is matter of defense and can not be judiciously considered until properly pleaded.

Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrers and for further proper proceedings.

G. W. Castle for appellant.

Jas. E. Stewart and K. F. Pritchard for appellee.

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## CORLEY, &c. v. LANCASTER.

(Filed May 19, 1883.)

1. Nuisance—An individual may maintain an action for a nuisance if he alleges and proves special injury to himself, although it also appears that the nuisance affects the public generally.

2. Estoppel—Though plaintiff consented to the building of the thing of which he now complains as a nuisance, he is not estopped unless he gave such consent, knowing or having reason to know that the thing when built would be a nuisance. His act or consent must have been such as to make any subsequent attempt on his part to recover damages therefor a positive fraud.

3. Evidence—Written contracts proposed, but not signed or agreed to, were irrelevant to the issue in this case, but appellants having introduced the one proposed by him, the other was properly given to the jury.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellants to recover damages on account of the alleged creation and continuance by appellee of a nuisance.

It appears that in 1874 appellee erected, about 250 yards from the residence of appellants, and on the opposite side of a stream called Hardin's creek, in Marion county, a large distillery, and that he operated his distillery and fed large numbers of animals confined under the sheds, constructed for the purpose, from five to seven months each year, from that time until the commencement of this action.

The residence of appellants, husband and wife, is situated upon a farm of near 100 acres, belonging to the wife, in front of which for several hundred yards flows the creek.

It is alleged by appellants that the deposits from the animals and other offensive matter produced by the distillery have been by appellee permitted to run into the creek, poisoning and rendering impure the water thereof that previously flowed into and over the lands of appellants, whereby it has become unfit for man or beast, or to gather ice from, which they previously used it for.

It is further alleged that the decaying matter produced in the manner mentioned has rendered the air so foul and offensive as to cause appellants and their family to become sick, and often to vomit while taking their meals. And in consequence of said alleged nuisance the value of their land as a place of abode has been greatly lessened.

Appellee in his answer denies that the nature of said creek had been rendered unfit for use, or the air made offensive as alleged in the petition, or that appellants have been damaged to any extent by reason of the alleged nuisance. And further answering, he states that if there had been any damages to appellants, which he denies, "the same was caused by the suggestion and instance of plaintiff, Anderson Corley, and he also permitted the removal of said cause of bad air."

Upon the trial the jury returned a verdict for the defendant in the action, and judgment having been rendered in accordance with it this appeal is prosecuted.

At the close of the evidence offered at the trial by appellants a motion was made by appellee for a peremptory instruction, but it was overruled.

The ground upon which the motion was made, and upon which counsel for appellee now contends that the judgment should be affirmed, is that the evidence showed that whatever nuisance existed, if any, was common to the whole neighborhood, and not special to appellants, and consequently they have no right to recover in this action, having failed to allege and prove special damages. And in support of his position cites the case of Cosby, &c. v. The Owensboro & R. R. R. Co., 10 Bush, 288, where this language is used: "Private indi-

viduals seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the general public, and that said injury is one that the public, in the promotion of the general interest, has no right to inflict upon them without compensation."

The nuisance complained of in the case just referred to was created by the construction of a railroad upon the public street of a city, and the court held "that the entry by the railroad company being an entry upon the possession of the public, the right of action to abate the nuisance, if one existed, was in the municipal authorities representing the local public immediately interested in the street so occupied." But even in that case the right of individuals to such relief against a public nuisance, where the injury is distinct from that suffered by the general public, was recognized.

There may be nuisances "public, in that they produce injury to many persons or all the public; and private, because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public and to damages at the suit of persons injured." (Wood on Nuisances, 22.)

In such cases an individual may maintain an action, though the nuisance complained of be public in its nature, if he alleges and shows special injury to himself, notwithstanding it appears that other individuals have also suffered injury from the same cause.

It does appear in this case that other persons suffered injury from the same alleged nuisance, but that is not a sufficient reason to deprive appellants of their right to maintain this action, if it be true that the water of the creek has been injured and the air they breathe has been poisoned and corrupted by the act of appellees, whereby the enjoyment of their property has been rendered essentially uncomfortable and inconvenient.

We perceive nothing in the situation or location of the distillery and cattle pens of appellee that authorize in this case an exception to a relaxation of the rule that everyone should so use his own as not to injure others. And, therefore, if appellants have suffered special and tangible injury therefrom, they have a remedy unaffected by the fact that others

have been likewise injured. Numerous errors have been assigned by appellants, all of which we do not deem it necessary to notice. They allege in their petition that the water of the creek had been so corrupted as to render it unfit for stock to drink or to gather ice from. By instruction No. 4, of which they complain, the jury are simply told that they must find for the defendant in the action unless they believe such was the condition of the water.

By instruction No. 6 the jury are told in substance that the right of appellees to use the creek to carry off the offal is conditioned upon it being so used as not to injure appellants.

Considered, as they should be, in connection with other instructions given, neither instruction No. 4 nor No. 6 is objectionable.

Instruction No. 5 is as follows: "Although the jury may believe. from the evidence, that there was no unusually bad smell from the cess-pool, caused by the rock dam having been built, yet if Corley advised or consented to the making of said dam the plaintiff can not recover in this action on account of such bad smell."

It appears that in 1876, or about that time, in order to prevent the flow of offal and the other offensive matter into the creek. appellee erected a stone dam upon his own land across a slough that extended from the distillery building to the creek, so that instead of going into the creek the matter was retained by the dam and formed a cess-pool, the effluence from which principally caused the offensive odor complained of by appellants. As applicable to this state of case, and upon the hypothesis that appellant, Anderson Corley, advised and consented to the building of the dam, the jury were instructed that appellants could not recover on account of the bad smell caused thereby.

Even assuming that it is sufficiently pleaded and proved that Corley did advise and consent to the building of the dam, still appellants are not estopped thereby unless it be shown that he gave such advice and consent, knowing, or having reason to suppose, that the dam when erected would be a nuisance, the rule in such cases being that, in order to constitute an estoppel, "the acts of the party affected by the nuisance must have been such as to make any attempt on his part to stop

the nuisance, or recover damages therefrom, a positive fraud." (Wood on Nuisance, section 798, and authorities cited.)

Appellants were entitled to immunity from injury, as well to the air as the water of the creek, and before they can be estopped, by reason of the advice and consent given for the erection of the dam, in order to preserve the water pure, it must appear that they are "fairly chargeable with notice" that the results of building it would be to poison or corrupt the air, as has been done. In our opinion, therefore, instruction No. 5 should not have been given without such qualification.

As there was no allegation in the petition that appellee caused dead animals to be placed in the creek, evidence in regard thereto was properly excluded.

The written contracts respectively proposed, but not agreed to or signed by appellants and appellee, in regard to the erection of a dam across the creek, in order to wash out the cesspool, do not illustrate the issues involved in this case.

But as appellants first offered in evidence the one proposed by them, it was not improper to permit the other to go to the jury.

But for the error indicated the judgment must be reversed and cause remanded, with directions to grant appellants a new trial and for further proceedings consistent with this opinion.

Russell & Avritt and Rountree & Lisle for appellants.

C. S. Hill and R. J. Browne for appellee.

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## TAYLOR v. HEMINGRAY.

(Filed May 15, 1883.)

**Surety—Extent of liability of—The court having ordered the sale of infants' real estate, appointed the guardian special commissioner to receive the proceeds from the master commissioner and reinvest the same. The guardian gave bond, with appellant as surety, to faithfully perform his duties, etc., as such commissioner. The proceeds of sale were paid to him by the purchasers, instead of to the master commissioner, as was proper. Held—The surety is liable to the infant on the bond, if the guardian fails to account for the money so received, notwithstanding the money was received from the purchaser instead of from the master commissioner.**

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

The appellee, Ann S. Hemingray, a daughter of Henry C. Timberlake, obtained by devise from her uncle, John Tibbatts, some real estate, consisting partly of unimproved lots in the city of Newport. She being an infant when the devise was made, her father, Henry Timberlake, qualified as her statutory guardian, with the appellant, John Taylor, as his surety. The estate devised was to his daughter for life, with remainder to her children. A petition in equity was filed by her guardian for a sale of this unimproved property, and an investment of the proceeds.

On the 31st of January, 1872, a judgment was entered directing a sale of the property by the court's commissioner, that judgment providing "the guardian having executed bond which is approved, is hereby appointed a special commissioner to receive the purchase money from the master commissioner when collected, and reinvest the same in productive real estate, under the supervision of this court, to be held under the limitations and by the parties as directed by the testator in his will." The bond is an undertaking to the infant that her guardian "will faithfully perform all the duties as special commissioner, to reinvest the proceeds of sale, obey the orders of this court in relation thereto, that have been or may be made, and account for his actions herein," dated 31st of January, 1872, signed H. C. Timberlake, J. B. Taylor.

The master subsequently filed his report of sale, and on the 30th of May, 1874, this order was entered: "The purchasers are permitted to pay the purchase money before due, and the guardian is directed to reinvest the same and report to court. The purchasers, Thomas Nestward and Joseph Stone having paid the purchase money, the master is directed to convey to them the lot purchased."

Taylor, the appellant, was surety on the original bond as guardian executed by Timberlake, and on the bond executed by Timberlake as special commissioner. At the time of the sale and execution of the bond there was no remainderman in existence, but shortly after the marriage of the devisee she gave birth to a child, named Robert, who is before the court asserting his claim.

Taylor, the surety, apprehending some trouble by reason of his liability, filed his petition in equity, seeking to avoid responsibility by reason of certain irregularities in the proceedings, alleging that the money, or a part of it, had gone into the hands of the guardian, and asking a settlement of the guardian's accounts. Out of that action and the failure of the guardian, as special commissioner, to make the investment, originates the claim of the life tenant and her child.

They filed an answer and cross petition, alleging a sale of the property, and that the commissioner was directed to pay over the money to the special commissioner for reinvestment; that no investment had been made or reported with reference thereto; that the guardian, although ordered to do so, had failed to make any investment or account for the moneys. They ask for a settlement, and that he account, etc., and for all relief to which they are entitled.

The defense is that the commissioner never collected the money, but that the purchasers voluntarily paid the money to the guardian without authority, and for that reason the surety is not liable; further, that as the guardian had no right to invest until he was ordered to collect the money, or commissioner to pay it over to him, and no order of court having been made in reference thereto, no breach could have occurred and none is alleged; that the guardian is liable to the purchasers, and not to these appellees as they had no right to pay it over.

The guardian as special commissioner made no report showing the balance in his hands unaccounted for, and in June, 1879, Timberlake was, by an order of court, directed to pay the money into court on or before the next term, and if he failed steps would be taken against the sureties. He failed to pay the money, and a judgment was then entered against Taylor, as surety, requiring him to pay the money to Hemingray as special commissioner, and from that judgment he appeals.

The chancellor is trying to reach this money in the hands of Timberlake, whether as guardian or as special commissioner, that he may have the proceeds reinvested. Taylor, in his original action, is denying his liability on either bond, and is seeking to avoid the payment of the money upon mere technical grounds. In the cross petition of the beneficiaries it is alleged

that bonds were executed by Taylor as the surety, and the covenant of each set forth, and the only defense the surety presents is that while the guardian was ordered to reinvest and the purchaser to pay the money before due, that he ought to have received it from the commissioner, whose duty it was to collect, and not from the purchasers.

The money, or the most of it, had been paid into court before the order directing the guardian to reinvest was made, and while there is no order in express terms requiring the purchasers or the commissioner to pay the money over to the guardian, as special commissioner, it must necessarily follow, when he was directed by an express order to invest, that he had the right to receive the money from either the purchaser or commissioner. By the original judgment, and under which the bond to reinvest was executed and approved, the guardian was appointed to receive the money from the commissioner when collected, and reinvest under the supervision of the court. He was not then ordered to reinvest, but at a subsequent term of the court the order was entered, as already recited, permitting the purchasers to pay the money for the land before the maturity of the notes, and they did pay the money into court, or the greater portion of it, and deeds were ordered to be made them by the commissioner. Whom they paid the money to does not appear, and at the same time the guardian was ordered, in this language, to make the investment: "The purchasers are permitted to pay the purchase money before deed, and the guardian is directed to reinvest the same and report to court."

The guardian received the money, whether from the commissioner or the purchaser does not appear, but failed to make the investment or to account for the money. It is immaterial whether he obtained the money from the commissioner or the purchaser, he was authorized to invest it and report to court, the order clearly implying his authority to receive the money, as he could not well invest the money when in the hands of the purchaser, yet it is maintained that because the record fails to show that the commissioner was directed to pay it to him, in express terms, the surety is released, and the cases of Hammond v. Crawford, 9 Bush, 75, and Greenwell v. The Commonwealth, 78 Ky., 328, relied on as authority to sustain the

defense. Neither one of the cases control the questions involved in this case. In Hammond v. Crawford the action was brought in the name of the Commonwealth as relator for the use of Silas Hammond and for the use of the trustees of the several school districts in the county against Crawford, former school commissioner for the county of Powell, and his sureties for failing to pay over certain moneys he drew from the treasury as the common school fund due the county. There was a demurrer to the petition by the sureties, and sustained on the ground that the petition failed to show he had authority of law to withdraw the money. In the case of Greenwell v. The Commonwealth the sureties on a sheriff's bond were attempted to be made liable for a tax that it was alleged the sheriff had collected, but that had never been imposed by the county court. This court held if the court imposed no taxation the sheriff had no right to collect. It was a local railroad tax, and the county court authorized to make the levy. These cases in their results are exactly the reverse of the case before us. In neither was there any authority for the principal to collect or appropriate the proceeds when collected, but here the petition was filed by the guardian asking a sale of the ward's real estate and an investment of the proceeds.

He executes a bond that as special commissioner he will invest the proceeds as directed by the court, with appellant as his surety. The original judgment under which the bond was given appointed the guardian a special commissioner to receive the purchase money from the master when collected, and reinvest the same, etc. This was the order appointing, but did not authorize him to invest or collect the money, but a subsequent order permitted the purchasers to pay the money before due, and the guardian, as special commissioner, was ordered to invest it and make report. He did receive the money, as he admits, but it is maintained that the record does not show that he received it from the commissioner. The surety undertook that he would invest it, and the failure to do so was the breach. He was entitled to the money for that purpose, and gave his bond that he would invest the proceeds. He was then ordered to make the investment, and admits that he received the money for that purpose. It is, therefore, an immaterial

inquiry, the order to invest having been made, whether he obtained the money from the one or the other. The money was in fact in court, and if the order had directed the guardian to withdraw it and invest it could not have been more certain and positive than the order made.

The surety was in court asking a settlement of the guardian's accounts, and insisting that all the moneys that were paid him were received by him as guardian, and not as special commissioner, and that as guardian Timberlake should be held to account, and he, as surety, released. These appellees in their cross action seek to recover on both bonds, but it is evidently an action on the bond as special commissioner. The court ascertained, through its commissioner, the amount due by reason of the collection of this purchase money, and required, by an interlocutory order, the guardian to pay the money on or before the next term of the court, and if not, that a judgment or steps should be taken to hold the surety responsible. The money was not paid and judgment rendered requiring the surety and his principal to pay the money over to Hemingray, who had married the ward, and was made commissioner to receive the money. We see no reason why such a judgment was not proper. The judgment could have been rendered in favor of the infants in no other mode, as the chancellor wanted to reinvest it. Their cross petition authorized such a judgment, and the same is, therefore, affirmed.

J. R. Hallam and Wm. Lindsay for appellant.

M. J. Dudley for appellee.

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## GORDON, &c. v. LEECH, &c.

(Filed June 7, 1883.)

1. Acknowledgment of deed—A particular certificate of the clerk as to the acknowledgment of a deed made before his deputy is held sufficient.

2. Certificate by deputy—Where the memorandum of the deputy is sufficient to serve as a certificate under chapter 24, section 21, General Statutes, it is immaterial that the certificate as afterwards written out by the clerk in full does not comply with that chapter.

3. Feme covert's acknowledgment—Where a statute provides the manner in which a feme covert may divest herself of title, the statute need be followed substantially only. Here the consideration of the deed having been received and enjoyed, the courts will not be diligent to find a technical defect in the ackowledgment of the deed by the feme.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hines.

Appellants, husband and wife, executed a mortgage to secure the payment of a certain amount of money loaned to the husband. The mortgage purports to convey both the homestead and dower interest of the wife, but appellants insist that the clerk's certificate is so defective as to render the mortgage inoperative as to the wife and to leave her a homestead. The court below subjected the whole of the property to the payment of the mortgage debt, and the only question on the appeal is: Did the conveyance divest the wife of her homestead right?

Indorsed upon the back of the mortgage is the following:

"1875, September 22.

"Acknowledged by W. L. Gordon and Cordelia A. Gordon, his wife, to be their act and deed as the law directs.

"C. W. CRABTREE, Clerk,

"By ERNEST SPEED, D. C."

After the body of the mortgage is the following certificate:

"Kentucky, }
"Hopkins County. } sct.

"I, C. W. Crabtree, Clerk of the Hopkins County Court, do certify that the foregoing mortgage from W. L. Gordon and Cordelia A. Gordon, his wife, to Mrs. Helen L. Shelby was this day produced to me in my office and with my foregoing, (by Ernest Speed, my deputy clerk) and this certificate have been duly recorded in my office as ordered.

"Witness my hand this September 22, 1875.

"C. W. CRABTREE, Clerk."

Section 38, chapter 24 of General Statutes reads:

"If the deputy of any county clerk shall take the acknowledgment of a deed or other instrument of writing, and endorse a memorandum thereof on such deed or instrument of writing, but shall fail for any cause to write out and sign the certificate thereof, it shall be lawful for the clerk to write out and sign the certificate, setting forth in such certificate the facts, including the endorsement, and thereupon record such deed or instrument and certificate, and the deed or instrument and the

certificate shall be as good and effectual as if certified and signed by such deputy."

Subsection 1 of section 21 of chapter 24 is as follows:

"Where the acknowledgment," speaking of the deeds of married women, "shall be taken by an officer of this State, he shall simply certify that it was acknowledged before him, and when it was done, which shall be evidence that she had been examined separately and apart from her husband, and the contents explained to her, and that she had voluntarily acknowledged the instrument, and consented that it should be recorded."

There are two reasons why we think the ruling of the court below is correct:

1st. The certificate of the clerk is sufficient if the endorsement by the deputy be considered a "memorandum" under section 38, quoted.

2d. It is immaterial whether the certificate of the clerk is sufficient if the endorsement of the deputy be considered a "memorandum," since we are of the opinion that the endorsement by the deputy is in itself a certificate in substantial compliance with subsection 1 of section 21, quoted.

Upon the first point the certificate of the clerk states that "and with my foregoing," evidently meaning certificate, "(by Ernest Speed, my deputy clerk) and this certificate have been duly recorded in my office as ordered." This reasonably imports that the mortgage was properly acknowledged by the parties before the deputy clerk; that he entered a certificate or memorandum of that fact, and that both the mortgage and endorsement of the deputy clerk had been recorded. But appellants say the certificate is not good under authority of Franklin v. Beckner and Wife, 11 Bush, 596. That case is not analogous because there is no intimation in the certificate of the clerk that the deputy clerk made any memorandum of the acknowledgment, and the certificate of the clerk does not state that any memorandum of the deputy clerk was recorded, but, on the contrary, negatives that idea by stating that the mortgage and the clerk's certificate were recorded. The failure to record the memorandum of the deputy (if any) was in itself enough to invalidate the mortgage. It is solely upon the ground that the memorandum of the deputy was not recorded

that the conveyance was held invalid as to the feme covert in McCormack v. Woods, &c., 14 Bush, 78.

As to the second point: If the endorsement by the deputy is a certificate such as is contemplated by subsection 1 of section 21, he having the unquestioned power to make it, it is immaterial that the clerk does not, as contended, meet the requirements of section 38 as to certifying "memorandums" made by deputies. Subsection 21 requires only that the certificate shall state that the instrument "was acknowledged before him and when it was done," privy examination of contents of the writing, voluntary acknowledgment, and consent to record are all presumed from such a certificate. The only thing lacking in this certificate is "before me" after the word "acknowledged." But certainly when the certificate is signed as this, no presumption could arise that it was acknowledged before any one else than the officer signing it. Where a statute provides the manner in which a feme covert may divest herself of title the statute must be followed substantially—in the spirit—not technically—not literally—when such technicality or literality defeats the spirit of the statute. Such statutes are intended to protect the feme from imposition by reason of the marital relation, and when that is accomplished by a substantial compliance with the statute, both the law and good morals are satisfied. It is right, both in law and in morals, to insist, in ordinary cases, upon one's legal rights, but the courts will not be so diligent to find a technicality to support a naked legal right as they will an equitable one recognizable in a court of conscience. Here there is no equity in appellants' claim. The consideration for the conveyance has been received and enjoyed, there is no indication of fraud or overreaching, and the judgment is affirmed.

Laffoon & Gordon and Wm. Lindsay for appellants.

Alvin Duvall and F. W. Darby for appellees.

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## FLINT v. COMMONWEALTH.

(Filed May 29, 1883.)

**The objection to a question being sustained, it was improper to permit counsel to state, within hearing of the jury, what he expected the witness to say in answer to the question.**

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

The charge in the indictment in this case that "the defendant did unlawfully, feloniously and maliciously, with intent to kill him, cut and wound one Phillip Yeiser," is sufficient under section 2, article 6, chapter 29, General Statutes. For the words used import an exercise of the will, and convey the same idea as do those in the section referred to.

2d. It is assigned as an error that the court permitted the attorney for the Commonwealth to state in the presence of the jury what he expected to prove by the witness, Spicer, the evidence having been decided incompetent.

Witnesses had been introduced and testified in behalf of and as to the character of the defendant, when the witness, Spicer, was called by the Commonwealth in rebuttal. And the first question put to him was whether or not he (the witness), and defendant had ever had a difficulty, which the court permitted answered, notwithstanding the objection of the defendant. The witness was then asked what occurred at that difficulty, the objection to which was sustained. But the court permitted the Commonwealth's attorney, although the defendant objected, to state in the presence of the jury that he expected the witness to state "on one occasion the defendant attacked witness on the street, and knocked him off the sidewalk with a wagon spoke."

If a party desires to reserve the question, a statement of what the witness would testify, if permitted, may be reduced to writing, but it is never proper to permit counsel, against the objection of the opposite party, to state orally, in the presence and hearing of the jury trying the case, what the rejected evidence would be if permitted by the court to be introduced, for with it the jury have nothing to do, and should not be influenced by it.

In this case the court erred in the first instance in permitting the witness to state he had ever had a difficulty with the defendant, for there was no connection whatever between that difficulty and the one in which the cutting and wounding was done, for which the defendant was then being tried. And evidence of what occurred at the time of the difficulty with the

witness, Spicer, which the Commonwealth's attorney, with the permission of the court, improperly and irregularly put before the jury, was obviously not competent for any purpose. But the jury did not know it was illegal evidence, and doubtless believing the statement was made by the officer of the State in good faith and for a legitimate purpose, may have accepted it as proof of a fact bearing materially upon the character of the defendant, whereby he was prejudiced and deprived of a fair trial.

3d. We perceive no error to the prejudice of the substantial rights of the defendant in the instruction given nor in the refusal of the court to give those asked by him, except that he was entitled to an instruction to the effect that the intent by him to kill must have existed at the time the cutting and wounding was done, in order to make him guilty of the offense charged.

For the errors indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

J. A. Dean for appellant.

P. W. Hardin for appellee.

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## CRAFT v. COMMONWEALTH.

(Filed June 9, 1883.)

1. Mode of contradicting dead witness—One having testified on a former trial, and afterwards died, his statements then made being given in evidence on a subsequent trial of the same case, it is Held—Those statements can not be impeached by evidence that the witness had, subsequent to the former trial, stated that his testimony at the former trial was false. The rule applies that he must first be inquired of as to such statement with circumstances of time, place and persons present. The fact that he is dead does not dispense with the rule. In that event such inquiries are impossible, and the impeaching evidence must, therefore, be excluded.

2. The fact that the witness was an accomplice does not alter the rule. He is to be impeached in the same manner as other witnesses.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Hines.

This is an appeal from a sentence of death on a conviction for murder. The case was here before on an appeal from a

like sentence and reversed, because of the failure of the court to properly instruct the jury as to the weight to which the testimony of an accomplice is entitled. (4 Ky. Law Rep.) On the first trial one Ellis, an accomplice, testified on behalf of the Commonwealth, to the guilt of appellant, but died before the last trial, in which trial the Commonwealth gave in evidence to the jury the statements of Ellis, made at the former trial. Appellant then offered testimony to the effect that Ellis, subsequent to the first trial, had stated that the evidence given by him on the first trial inculpating appellant was false. This evidence the court rejected, and the correctness of that ruling is the only question we need inquire into on this appeal.

In this State it is settled, in harmony with the adjudications in the majority of States, that before evidence can be adduced to impeach a witness by proof of statements contradictory of what he has testified, he must be inquired of as to such statements, with circumstances of time, place and persons present. This rule is established in civil cases by the Code, and in criminal prosecutions by an unbroken line of decisions.

It is insisted for appellant that this rule does not apply where the witness sought to be impeached is dead. In this State there is no reported case in which the question has been presented, but there are numerous cases in which the evidence of a deceased witness, both by deposition and orally, has been reproduced, and this fact is strongly persuasive that such impeaching testimony has been uniformly considered incompetent, since it could not have been introduced without making it an exception to the well-established rule that the witness sought to be impeached must first be inquired of as to the circumstances of time and place of the contradicting statements. The reason of the rule is that the witness attempted to be impeached may have an opportunity to contradict or explain such alleged statements. Such evidences is an exception to the well-recognized rule that hearsay evidence is not competent, and is only admitted upon the condition that this opportunity of contradiction or explanation be had. If such an exception

were made to the general rule excluding heresay evidence there would be a strong temptation to the fabrication of evidence by which important and true evidence might be destroyed. An exception to this rule has been contended for in the admission of the declaration of a deceased witness to a deed or will in disparagement of the evidence afforded by his signature, but has been disallowed. (Greenleaf on Evidence, section 126.) Even in an ex parte proceeding for the probate of a will, where the opposite party has no opportunity to cross examine the witnesses, the courts have refused to allow the deceased witness to be impeached by proof of statements in conflict with his evidence given under oath. (Runyan v. Price, &c., 15 Ohio State, 1.)

In the case of Stacy v. Graham, 14 N. Y., 498, the testimony of a witness had been taken de bene esse and read on the trial, whereupon the defendant offered to prove conversations with that witness after his examination, in which he confessed that his evidence was false; that it had been given under threats, and that he regretted having testified as he had. The court refused to permit the impeaching testimony to be heard, and in the opinion said:

"Nor can we, in the present case, admit a distinction founded on the circumstance that the admissions of the witness were made, as alleged, after he had been examined. I can not perceive that the reasons on which the rule in question is founded lose any of their force in such a case. And not only do these remain unimpaired, but there is an additional one to be found in the temptation held out to tamper with witnesses after their evidence has been given. I can conceive of nothing more dangerous in principle than the doctrine contended for. When a witness has been examined and cross-examined, if we allow him to be approached afterward and declarations to be drawn from him inconsistent with his testimony, and then receive those in evidence without the protection which the rule affords, there will be no safety in trials. When the first experiment of this kind shall be sanctioned by the courts there is no doubt that it will be often repeated, and with greater or less success."

It does not matter that in the present case the witness sought to be impeached was an accomplice, notwithstanding the fact that under our Code his evidence is not admissible

unless corroborated. When his evidence is corroborated he occupies the same attitude as any other witness so far as the method of contradicting or impeaching him is concerned. In this case there is corroborating evidence sufficient to have permitted the jury to consider the evidence of the accomplice, and the jury are the sole judges as to what weight should be given to such corroborating testimony.

Judgment affirmed.

Z. F. Smith, Jr., for appellant.

P. W. Hardin for appellee.

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## ABSTRACTS OF DECISIONS OF COURT OF APPEALS—NOT TO BE REPORTED.

### GARROTT, &c. v. BUCKNER, &c.

Filed May 24, 1883. Appeal from Oldham Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Constitutional law—Act imposing tax for construction of turnpike—An act, entitled "An act to authorize the people of LaGrange and Westport voting precincts, in Oldham county, to vote a tax for the purpose of building turnpike roads in said precincts," approved April 9, 1878, is constitutional. The act and amendments thereto relate to but one subject, which is sufficiently expressed in the title.

2. The legislature has the power to impose taxes upon the people of counties and precincts for the construction of railroads and turnpikes upon their ratification at the polls.

3. The fact that the act and amendments were not ratified by the two precincts at the same election is not a valid objection thereto, it being provided that an election should be held on the first Monday of August and February of each year for five years, or until said tax should be ordered.

4. The power given to the commissioners to remit taxes in cases of certain persons not able to pay them is not a violation of the rule requiring equality and uniformity of taxation.

Clore & French and Carroll for appellants.

Robbins & McIntyre and W. S. Morris for appellees.

### CLEVELAND v. CLEVELAND, &c.

Filed May 24, 1883. Appeal from Jessamine Circuit Court. Opinion of the court by Judge Pryor, affirming.

Construction of will—Defeasible fee—A testator, having been married twice, devised to his only child by his first wife a tract of land "to her and her heirs forever." He then says: "My six children not provided for (naming them) are to have the balance of my estate not disposed of. In case of the death of any of my children without bodily heirs, their landed estate to revert back to their brothers and sisters."

Held—That the children took a defeasible fee and not a life estate, with remainder to their children. Words of inheritance are not required to be used in a deed or will in order to pass a fee, whether absolute or conditional. It is clear that the devise to the daughter by the first wife gave to her the fee, and no reason appears upon the face of the will or from the language used that would lead to the conclusion that it was the purpose of the testator to limit the estate in the property devised to an estate for life as to all of his children, except this daughter.

Hunt & Darnall for appellant.

Porter & Wallace for appellees.

CROFOOT'S EX'OR v. DUVALL.

Filed May 26, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, reversing.

1. Imprisonment of trustee for failure to pay over money—The chancellor had no power, by summary process, to imprison a trustee for not paying over money which had not been placed in his hands by order of court, but which had come to his hands as rightful executor. Upon his failure to comply with a rule requiring him to pay the money an execution might be issued, but the chancellor had no power to imprison him for the failure to pay.

2. Effect of reversal of judgment—The reversal of a judgment by the appellate court has the effect to annul any subsequent judgment or order entered in the same case, after the appeal was taken, adverse to the judgment of the appellate court.

Elliott & Hemingray for appellant.

Bijur & Davie and Lane & Harrison for appellee.

WRIGHTSON v. CLINE.

Filed May 26, 1883. Appeal from Campbell Chancery Court. Opinion of the court by Judge Pryor, affirming.

1. Title of purchaser at judicial sale—A report of sale having been confirmed without objection, the fact that the credit given the purchaser is for a longer period than is authorized by law does not affect the rights of the purchaser or invalidate the sale. Neither is he affected by the fact the sale was not properly advertised; nor is it material in determining the question of title that the purchaser is paying the plaintiff more than he was entitled to recover.

2. Failure of purchaser to comply with rule to pay sale bond—The fact that an attachment had been issued against the purchaser and his surety upon their failure to comply with a rule requiring them to pay the sale bond executed for the purchase money was no reason why an execution should not go against them, the chancellor having no power to imprison them for the nonpayment of the bonds.

J. R. Hallam and C. L. Raison, Jr., for appellant.

F. M. Webster and C. J. Helm for appellee.

PRESTON v. ROBERTS.

REDD & BRO. v. CITY OF LOUISVILLE.

Filed May 26, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, reversing first case and affirming second.

1. The publication of an ordinance for street improvements on the Sabbath, and on no other day, is not such a publication as the charter of the city of Louisville requires.

2. Lien for street improvements—A contractor can not recover of the city of Louisville for street improvements when the owners of adjacent property have been released from liability by reason of the failure of the city council to take proper steps to make them liable.

Barrett & Brown, R. W. Woolley and John Marshall for appellant Preston.

W. B. Fleming and C. B. Seymour for appellee Roberts and appellants Redd & Bro.; T. L. Burnett and Lane & Harrison for city of Louisville.

STROTHER v. CYRUS.

Filed May 19, 1883. Appeal from Boyd Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

1. Parol gift of land—Adverse possession—So long as a donee or vendee of land looks to the donor or vendor for title the holding must be considered to be amicable, and the statute of limitations unavailable as a defense or bar to recovery on equitable principles.

2. The appellant having entered upon the land sued for under a parol gift, is entitled to pay for improvements and his outlay for taxes, subject to an account for rents; and the proof showing that the value of his improvements and payment of taxes were not greater than the rents, he has failed to show himself entitled to any relief except from payments of rents, which the judgment in effect accorded him.

Hampton & Moore for appellant.

K. F. Pritchard for appellee.

CLARKSON, &c. v. ALLISON, &c.

Filed May 24, 1883. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Construction of deed—The chancellor, for the purpose of aiding in the construction of a deed, can ascertain the nature and extent of the interest each party to the conveyance had in land conveyed, although he can not leave the conveyance for the purpose of showing a different intention from that expressed, in the absence of an allegation of fraud or mistake.

In a conveyance by a life tenant and the owner of the remainder, in which the husband of each united, the draftsman having made an absolute grant for both the husbands and wives, proceeds to divest the husbands of their respective interests in the land, including the rents and profits. The husbands then proceed to warrant the title without uniting their wives as warrantors, and in concluding the wives relinquish "all their right and claim of dower."

Held—That the wives in conjunction with their husbands divested themselves of all title by the conveyance. Having ascertained what interest the parties had, it is clear that the claim to dower refers to the dower interest of the life tenant which she was selling, and that the purchaser did not pay the husbands the full value of the land for their interest merely when they had no interest except that the husband of the life tenant held jointly with her for life.

Stevenson, O'Hara & Bryan for appellants.

R. H. Hanson, Brent & McMillan and Houston & Mulligan for appellees.

McCLELLAND v. HAMILTON'S ADM'R.

Filed May 24, 1883. Appeal from Woodford Circuit Court. Opinion of the court by Judge Pryor, reversing.

A married woman may bind her separate estate by a contract for her use and benefit, but can not bind it for the debt of her husband or that of others.

A. Duvall and Porter & Wallace for appellant.

D. L. Thornton for appellee.

DOYLE v. SWIFT IRON AND STEEL WORKS.

Filed May 24, 1883. Appeal from Campbell Circuit Court. Opinion of the court by Judge Pryor, reversing.

1. Negligence—Remedy of employe against employer—An employe who voluntarily assumes a character of labor that is perilous, and is injured thereby, is without remedy against his employer unless the latter, by the exercise of ordinary care and caution, could have prevented the injury; so the employer or subordinate under him, who is the superior of the party injured in the control and direction of the work, must be guilty of gross negligence before a recovery can be had.

2. Injury by neglect of fellow servant—Subordinates engaged at the same time in the same work, and with like power of control, have no right of recovery against the employer for injuries to each other, caused by their own neglect or want of care. They assume all such risks when they agree to work together as fellow laborers.

3. Contributory negligence—The fact that the party injured was guilty of contributory negligence will not prevent a recovery if the employer or the one controlling the work, or superior in authority, could have prevented the injury by the exercise of ordinary care.

4. Defective machinery—The employe had the right to presume that the company in whose employ he was would furnish safe machinery, and if the machinery furnished was defective, and so known to the company, or by the exercise of ordinary care and caution the company or its agents could have known the machinery was defective, and the injury was caused thereby, the company is responsible.

5. Instruction as to admission in pleadings—It being alleged by the plaintiff, and not denied, that a receipt relied upon by the defendant as a settlement was obtained by a representation that it was not intended as a settlement in full, but only to aid in defraying the expenses of the injured party, the court should have instructed the jury that it was admitted in the pleadings that no settlement had been made.

Benton & Benton for appellant.

George Washington for appellee.

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## THE RECENT MEETING.

The annual meeting of the bar association of this State was held in Louisville on the 28th and 29th of June. The attendance was large, but many cities and towns throughout the State were not represented. This is to be regretted, as the benefits of these gatherings are greatly increased, not only to

each member individually, but to the association as a body, by having all parts of the State represented. The papers read and the discussions held were most interesting and instructive. A full report of the proceedings will be published, so that it is unnecessary to make any extended mention of what was said, even if it were possible in so narrow a space, to do justice to so many and various items of interest.

The paper on Codification of the Law merits careful study. The idea that it advocates is most beneficent. The only question is whether codification is practicable. Let the law be reduced to statutes. We get rid of the old books with their conflicting and puzzling decisions; but a new crop will arise. The statutes must be construed, no sentences framed by the most skillful in the use of words can be so luminous as to need no construction. It is said the statute of frauds, prepared by one of the ablest of English judges, cost the nation a subsidy to construe each clause of it. But let the lights be turned on the subject, and let us have it fully considered. The discussion on the jury system was very interesting, and those who care to pursue the subject further will find a pointed article on it by Judge Deady, of Oregon, in the May-June number of the American Law Review. He insists that the most serious complaints against juries are due to the following causes:

1st. The rule requiring unanimity in the verdict.

2d. The abuse of the challenge for cause and the unnecessary number of peremptory challenges.

3d. Laws requiring the charge of the judge to be in writing, and forbidding him to speak of the facts.

With reference to the latter point he says: "Trial by jury, when properly understood, means a trial by the court with a jury. When able, eloquent and ingenious counsel, impelled by the desire of professional success and the hope of great, and it may be contingent, gain, are allowed to talk to the jury hour after hour, to ransack heaven and earth for arguments, illustrations and suggestions for the purpose of inflaming their prejudices, arousing their passions and swaying their judgments, it is absolutely necessary, to enable the jury to act understandingly, that some competent and impartial person

should sift the matter before them. And this is, above all else, the proper duty and highest function of the judge. In the discharge of it he should recall to the jury the evidence, pro and con, should weigh the arguments on either side of the case or question, and then submit to them the very questions upon the determination of which their verdict ought to rest." At least, it seems that the fears expressed by some lest the judge should exert an undue influence over the jury are without foundation, when it is considered that the jury is most efficient in England where this very method of charging them prevails. No cry of corruption in the judge or servility in the jury comes from that country. Whatever may be said about the proper mode of changing the Constitution it appears reasonaby clear that there is no need for such change. There is a dead clause in it on the subject of slavery, but we suffer no inconvenience from that, thanks to the Federal instrument. A revisory convention would remove that dead limb, but is that all? The Constitution, as it now stands, contains many valuable safeguards, e. g., the one which secures us against State debts. Would this be preserved? We had better—

> "—bear those ills we have
> Than fly to others that we know not of."

The full report of the proceedings may be looked for with interest and read with profit, and it is but true to say the archives of the association will form a valuable storehouse where future legislation may receive much useful aid. It has been suggested that the meetings had better be held in future during the week between December 25 and January 1, as all courts are then adjourned and all the lawyers could leave home without any inconvenience, if they desire to. The present time of meeting is certainly objectionable in some respects, as many of the courts are still in session on the 28th of June, and neither lawyers nor judges are able to get off.

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## CURRENT TOPICS.

The Missouri Bar Association holds its (third) annual meeting at Sweet Springs, in that State, on the 25th and 26th of this month. For some reason they have gone out of the State

to select the person to deliver their annual address, and have chosen Gov. Palmer, of Illinois.

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The place of meeting of the American Bar Association has been changed from White Sulphur Springs to Saratoga. The former place could not furnish adequate accommodations.

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The following have been sent as solutions of the twin problem. (See ante, 923.)

I should say it was a case of lapse. The testator died in fact intestate. The law must make his will.

N. Y., June 15, 1883. M. S.

My solution of the question is to construe the will as devising to the mother five-twelfths of the estate, to the daughter three-twelfths, and to the son four-twelfths; that is, one moity to the mother and daughter in the proportion of one-half to each; and the other moity to the mother and son in the proportion of one-third to the mother and two-thirds to the son. G. C. D.

Frankfort Ky.

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After a struggle lasting for years a bill is about to pass the English House of Lord's allowing a man to marry his deceased wife's sister. The bill, though advocated by the royal family, is warmly opposed by the clergy, who are said to regard such marriages as unholy and adulterous.

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Chief Justice Sharswood, of Pennsylvania, who is well known as the annotator of Blackstone, died last month.

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Besides the article by Judge Deady, already referred to, on trial by jury, the American Law Review for May and June contains the following: Practice in Cases of Foreign Extradition; Fraudulent Mortgages of Merchandise; Pilotage; State Legislation thereon; Actions on Judgments; Implied Warranty of Fitness of a Chattel.

# KENTUCKY LAW REPORTER AND JOURNAL

VOL. 2. AUGUST, 1883. No. 2

## CURRENT TOPICS.

The reports of the United States Supreme Court are being published at a very low figure. Beside the other editions already advertised, Little, Brown & Co., of Boston, offer Otto at $2 per volume, by the set; Curtis, in 22 volumes, at $44; and a complete set of the reports, embracing Curtis, Miller, 4 volumes; Wallace, 23 volumes, and Otto, 16 volumes, at $130.

The reports of the meeting of the Alabama Bar Association, held in November, 1882, is out, inter alia. The abolition of the court of chancery and the enlargement of the rights of married women were recommended. In regard to "Trial by Jury" a paper was read favoring a majority verdict in civil, and a unanimous verdict in criminal cases; also favoring the lessening of exemptions from jury service and the providing of convenient copies of the evidence for use by the jury.

Judge Story, writing of the way in which the judges lived in Washington in his day, says: "The fact is, we judges take no part in the society of the place. We dine once a year with the

President, and that is all. On other days we take our dinner together, and discuss at the table the questions which are argued before us. We are great ascetics, and even deny ourselves wine, except in wet weather." Here the judge paused, as if thinking that the act of mortification he had mentioned placed too severe a tax upon human credulity, and presently added: "What I say about wine, sir, gives you our rule; but it sometimes happens that the chief justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him the sun is shining brightly, Judge Marshall will sometimes reply: 'All the better, for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere, and it will be safe to take something.'"

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## NOTES OF CASES.

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### I.

Legislation in England is getting progressive. The time-honored law prohibiting a man from marrying his deceased wife's sister has been vehemently attacked and barely failed of a repeal, the majority against it being only five. And now it is proposed to repeal the statute of frauds, at least to this extent—when a party relies on a contract which was not, though it ought to have been by the statute, reduced to writing, he may subject his opponent to a sort of purgation and force him to say under oath whether he did or did not enter into the contract, and if it appears by this process that a contract was made, otherwise sufficient in the law, the court is to enforce it. The change seems a wise one, as there can be no objection to enforcing a contract which the obligor admits to have been made.

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### II.

In Boyle v. State, Wis. Sup. Ct., 15 N. W. Rep., 827, it was held that medical books can neither be given in evidence, nor can a physician be permitted to give extracts therefrom, from

memory, in evidence (Whiton v. Ins. Co., 109 Mass., 44; Fowler v. Lewis, 25 Tex., 380; Carter v. State, 2 Ind., 617; State v. O'Brien, 7 R. I., 336; Ware v. Ware, 8 Me., 42; Davis v. State, 38 Md., 15, 36; Fraser v. Jennison, 42 Mich., 206, 214); nor can such books be read to the jury by counsel in argument (Washburn v. Cuddihy, 8 Gray, 430; Wade v. DeWitt, 20 Tex., 398; Ashworth v. Kittridge, 12 Cush., 194; Huffman v. Click, 77 N. C., 55; Fraser v. Jennison, supra). The question seems never to have been decided by the Court of Appeals of this State, though we believe it is the practice in some of the lower courts of the State to admit such books, and also to allow counsel to read from them.

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III.

Mr. John D. Lawson, in 28 Alb. Law J., 7, says, in reference to the presumption that every one knows the law, that the rule is that every one is presumed to know the law when ignorance of it would relieve from the consequences of a crime, or from liability upon a contract.

The presumption that every person knows the law is often spoken of, but it is clear that there is no such general presumption. When Mr. Dunning, in arguing before Lord Mansfield, said: "The laws of this country are clear, evident and certain; all the judges know the laws, and, knowing them, administer justice with uprightness and integrity," that learned judge replied: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is, that it is so uncertain that it costs much money to know what it is, even in the last resort." (1) "Is it not a mockery," said Mr. Livingston, in his report on the Louisiana Penal Code, "to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten or might be found in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to examine his

books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted." Certainty in the law has hardly increased since Lord Mansfield's time, and Mr. Livingston's lawyer would to-day point to a library of five thousand instead of five hundred volumes. We may, therefore, safely say, with Mr. Justice Maule, "there is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so," and add, as he did, with a quiet dig at his learned brethren: "If everybody knew the law there would be no need of courts of appeal, whose existence shows that judges may be ignorant of law."

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IV.

In Gulf, &c., Ry. Co. v. Levy, Tex. Sup. Ct., 1 Tex. L. Rev., 341, it was held that where a telegram is sent by a son to his father, announcing the death of the wife and child of the son, and soliciting the presence and pecuniary aid of the father, whatever contract was made by the son was made for his benefit alone, and that contract can not be made the basis of recovery by the father, and in an action by the father for failure to deliver, or delay in delivering, the telegram the father can not recover for his mental distress, but only for injury to his person, property or reputation. The English cases hold that a person to whom a message is sent can not maintain an action for its nondelivery, correctly, or within the proper time, though he may have suffered pecuniary loss thereby, unless the sender sustains to the receiver the relation of agent, and thereby establishes a privity of contract (Playford v. United, &c., Co., 4 Q. B., 706). But this is not the rule in this country. It is also held in this case that the transmission of such a telegram on Sunday (announcing the death of the wife and child and asking aid) was a work of necessity and charity, and the contract for its delivery was not illegal.

V.

General Statutes, chapter 52, article 8, provides that divorce may be granted to the party not in fault for abandonment by one party of the other for one year. In the recent case of Kean v. Kean, in Louisville Chy. Ct., Pirtle, special chancellor, holds, where the husband has ordered his wife to pack her trunks and leave the house, which she accordingly does, and he thereupon applies for a divorce on the ground of abandonment, he is not entitled to it, for, though the wife has been guilty of an actual abandonment, yet his conduct in ordering her away places him in fault, and takes away his right of complaint. His conduct in ordering her away would not of itself entitle her to a divorce, but it estops him from procuring one on the ground that she has left or abandoned him. This decision throws much light on the meaning of the expression "to the party not in fault," as used in the statute. It shows what conduct places a party in fault. See also Logan v. Logan, 2 Ben Monroe, 142, where the husband having left his home because his wife scolded, she afterwards moved away also, and he then returned. She applied for alimony, and the court held that she was entitled to it, as the husband was in fault in leaving her without cause, her scolding being no sufficient cause. In Hardin v. Hardin, 17 Ala., 255, it is held that where the wife had left because her husband accused her of infidelity, though this charge would not, perhaps, have been ground of divorce to her, yet it was sufficient cause for leaving him, and she was not in fault in doing so. So in Pidge v. Pidge, 3 Met. (Mass.), 257, the husband's abuse having driven the wife away, she was held not entitled to a divorce on account of such abuse, but at the same time it was said he could not ask a divorce on account of her abandonment. In Epling v. Epling, 1 Bush, 75, it is held that plaintiff must both allege and prove that the abandonment was without fault on his part.

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## KENTUCKY COURT OF APPEALS.

## MUNDAY v. COMMONWEALTH.

(Filed June 9, 1883.)

1. Practice—Challenging jurors—In a criminal case, either party having accepted the panel, or what is equivalent, having declined to challenge when

**duly called on by the court, can not at a subsequent stage in the formation of the jury put in a challenge.**

**2. Law of self-defense—Upon a plea of killing in self-defense the proper inquiry is whether the accused had reason to believe himself in danger of death or great bodily harm from the violence of deceased, and not whether he was actually in such danger. And the jury should not be instructed that it must appear to them that the accused was in such danger before they can acquit.**

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, being indicted for manslaughter, was convicted and sentenced to confinement in the penitentiary for the term of four years.

One of the errors assigned is that the court refused to permit him to challenge peremptorily W. R. Holdy, and ruled that the case should be tried with him as one of the jury.

It appears from the bill of exceptions that the names of twelve persons having been drawn, who upon examination were found qualified, the court "notified the Commonwealth's attorney and defendant that they could then pass upon the jury and challenge peremptorily such of them as they desire to do, but that, in case they failed to challenge any of the number, such jurors on the panel as had not been challenged would be regarded as accepted," to which ruling the defendant excepted at the time.

Thereupon the Commonwealth, having declined to challenge any of the twelve so presented, the defendant challenged peremptorily seven of the number, but did not accept the five remaining jurors, though he refused to challenge either of them.

The clerk then drew from the panel of the remaining regular jurors the names of seven others, including said Holdy, found to be qualified. The Commonwealth again declining to challenge, the defendant challenged peremptorily five of the same, leaving said Holdy and one other not challenged.

Five bystanders were then duly summoned and found qualified, all but one of whom was challenged peremptorily by the Commonwealth.

The panel was again filled, when one of the five was challenged by the defendant. Another one was then summoned

whom both parties declined to challenge. But appellant then offered to challenge peremptorily said Holdy, which the court refused to permit.

Whether the court erred or not in this ruling must be determined by the Criminal Code, the sections thereof relating to this subject being as follows:

"Section 191. When an issue of fact in a criminal prosecution is about to be tried the clerk shall draw, in the manner directed by the General Statutes, the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury.

"Section 192. When a juror is excused, or challenge to a juror sustained, the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and if they be exhausted similar orders may be made for summoning other jurors until the jury is completed.

"Section 201. The challenge to the individual juror is either, first, peremptorily; or, second, for cause.

"Section 202. It must be taken before he is sworn in chief, unless the court for good cause permits it to be made at any time before the jury is completed.

"Section 215. The challenges to the juror shall first be made by the Commonwealth and then by the defendant, and each party must exhaust his challenge to each person before the other begins."

Under the Code each party is entitled to a full panel of jurors, found upon examination qualified to try the case, before being required to exercise the right of challenge to the individual juror. And whenever the number is lessened by challenges of either party the panel must be again filled before being passed on, and so on until the jury is completed.

But it was not intended that either party, having accepted the whole or part of the panel, or what is equivalent, having declined to challenge when duly called on by the court to pass upon them, should be permitted, at a subsequent stage in the

formation of the jury, to again pass upon and challenge the same jurors.

There is but one construction that can be properly given to section 215. When a full panel of qualified jurors is presented the Commonwealth must then either accept or challenge. Having accepted or declined to challenge, the challenges as to those then passed on are, in the language of the Code, exhausted; or, having challenged one or more, the others must be considered as accepted.

If this be not the case then the formation of the jury may be indefinitely suspended or else the defendant would, in violation of the plain language of that section, be required to begin before the Commonwealth had exhausted her challenges to the individual jurors of the first panel.

The right of challenge is to be exercised by the Commonwealth and by the defendant in the same manner and upon the same conditions, the only difference being as to the number of peremptory challenges allowed to each. The defendant, as well as the Commonwealth, is, therefore, required to exhaust his challenges to each juror of a panel when presented to be passed upon. Otherwise, when the panel is filled a second time, the Commonwealth would be required to begin before the defendant had exhausted his challenges to the jurors of the first panel.

In this case Holdy, as one of a full panel of qualified jurors, was presented for the acceptance or challenge of both the Commonwealth and the defendant, and not excepted to or challenged by either until after twelve jurors found qualified had been passed upon, when, for the first time, appellants offered to challenge him peremptorily.

If he had the right at that stage of the proceedings to peremptorily challenge him, he had the reserved right to challenge each of the other eleven, and to continue the tedious process of challenging, one by one, the jurors already passed on to the number allowed by law. And if the defendant could thus delay the proceeding and trifle with the court, so might the Commonwealth's attorney.

Properly construed, section 202 is not inconsistent with section 215, as we have interpreted the latter. Both sections re-

quire the challenges to the individual juror before he is sworn in chief; that is, sworn to try the issue, which, as provided in section 217, must be done when the "jury, consisting of twelve qualified jurors, shall have been duly empaneled." But, as provided in section 202, the court may, for good cause, permit the challenge to the individual juror to be taken at any time before the jury is completed; or, in other words, before the jury is duly empaneled, the words "good cause" being obviously used in a different sense from "cause," as contradistinguished from "peremptory."

In this case no good cause was shown for permitting appellant to challenge the juror he previously, at the proper time, passed on, or had the opportunity to pass on. And hence the court did not err in refusing to make in his favor an exception to the rule that "each party must exhaust his challenges to each juror before the other begins."

But the instructions do not give to the defendant the full benefit of the law of self-defense.

The jury are told in instruction No. 6, given at the instance of the Commonwealth, that to authorize them to acquit the defendant they must believe that when he fired the fatal shot he was in apparent danger of death or great bodily harm at the hands of deceased, or had reasonable grounds to believe, and did believe, that he was in such danger, and had no other apparent safe means of escape.

The instruction "left it to the jury to say whether it appeared to them necessary for appellant to do the shooting in order to protect himself, while the instructions should have gone to the facts as they appeared to appellant." "The inquiry always is, what was the danger as it appeared to the accused, and not what the danger actually was" (May v. Commonwealth, MS. opinion. 15th Dec., 1881). Besides, the latter clause of the instruction is so worded that the jury would reasonably infer that it was not sufficient for acquittal that appellant believed, and had reasonable grounds for believing, that he was in such danger, but that it should also have been made to appear to the jury that he had no other safe means of escape. "The rule as established is that if the defendant acts upon 'reasonable grounds' he is to be excused, although it may

turn out that the appearances were false, and there was in fact neither design to do him serious injury nor danger that it would be done." (Holloway v. Commonwealth, 11 Bush, 344.)

The error in this instruction is not cured by any other instruction given in the case, and was prejudicial to the substantial rights of appellant.

Wherefore, the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

E. W. Hines, Milliken & Bush and Alvin Duvall for appellants.

P. W. Hardin for appellee.

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## CITIZENS GASLIGHT CO. v. LOUISVILLE GAS CO.

(Filed June 16, 1883.)

1. Injunction—Where appellee asserts the exclusive right to manufacture gas in a particular city under an act of the legislature, which is unconstitutional and void, and thereby puts appellant's right to manufacture gas, also in the same city, under a cloud and prevents it from raising the necessary funds for the purpose, appellants are entitled to an injunction to restrain appellee from setting up such exclusive right.

2. The fact that appellant has not obtained, as required by its charter, the consent of the city to lay its pipes and to do certain other acts essential to the enjoyment of its franchise, does not destroy its right to an injunction to restrain appellee from casting a cloud on the right to that franchise.

3. Constitutional law—The title, "An act to extend the charter of the Louisville Gas Co.," embraces the one subject of the act, the manufacture and supply of gas in the city of Louisville, and the act is constitutional.

4. Constitutional law—An act conferring on an individual the exclusive right to manufacture and supply gas is forbidden by article 13 of the State Constitution, is in restraint of trade and void.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines.

In 1838 the legislature chartered the Louisville Gas Company, with the exclusive privilege of manufacturing and furnishing gas to the city and citizens of Louisville until the 1st day of January, 1869, at which date the charter was to expire.

On the 30th of January, 1867, in anticipation of the expiration of this charter, the legislature passed an act, entitled "An act to extend the charter of the Louisville Gas Company,"

which provided that it should take effect from the 1st day of January, 1869, and continue twenty years. This last act was in effect, as we have decided in the case of Cain v. Commonwealth, 14 Bush, 535, the creation of a new charter, the powers under which are to be ascertained by reference to this act and not by reference to the act of 1838. In this last act of 1867 there is no grant of an exclusive privilege to manufacture and sell gas in the city of Louisville.

On the 22d of January, 1869, after the charter of 1867 had gone into effect and after its acceptance by the stockholders of the old company, the company applied to and obtained from the legislature an amendment to the act of 1867, by which the company was given the exclusive right to manufacture and furnish gas to the city and to the citizens of Louisville during the life of the charter.

On the 21st of March, 1872, the legislature chartered the "Citizens Gaslight Co.," with power to manufacture and furnish gas to the city and citizens for the period of fifty years. The third section of that act reads:

"Said company shall have power and authority, with the consent of the general council of said city, to open the ground in every highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas; said company restoring the same to as good condition as before, within a reasonable time thereafter; said company being required, in so doing, not to injure any gas or water pipes, or connection, or sewer laid therein, and said corporation being liable to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing or restoring as aforesaid; and such power and authority is subject to such reasonable regulations as the mayor or city council may make for the protection of life, property and health of citizens."

Appellant instituted this action in equity, alleging the facts stated, and that the claim of appellee to the exclusive right to manufacture and supply gas in the city of Louisville cast a cloud over appellant's title to the franchise, and prevented it from selling its stock to raise the sum of money necessary to the enjoyment of its franchise, and preliminary to its beginning

work under its charter. Appellant prays that the cloud on its title may be removed; that it be adjudged that appellee has no such exclusive right as asserted, and that an injunction be granted restraining appellee from asserting such exclusive claim.

On hearing the court dismissed appellant's petition with costs, from which judgment this appeal is taken.

The first point made by appellee is that this proceeding in equity for an injunction is not the proper remedy by which to determine whether appellee has the exclusive right to the manufacture and supplying of gas to and in the city.

If the exclusive right insisted upon by appellee is without warrant of law, is unconstitutional and void, and the assertion of that right prevents appellant from selling its stock and raising the large amount of money necessary to entering upon the enjoyment of its franchise, the whole of the charter rights of appellant are destroyed by the assertion of an unfounded claim on the part of appellee. In such case the remedy adopted is peculiarly appropriate as has been expressly adjudged in the similar case of Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann., 142. As to whether such claim of exclusive privilege is unfounded, because unconstitutional, we will inquire into hereafter. It is enough for jurisdiction that the claim is so alleged.

Secondly, it is insisted that as the conditions of the consent of the city council, manifested by ordinance exhibited with the petition, are conditions precedent to the exercise of appellant's franchise, and that as they have not been complied with appellant has no right to entertain its action. Those conditions are contained in the 9th and 10th sections of the ordinance, and are as follows:

"Ninth. That said company shall proceed as rapidly as practicable to establish its works and lay down its pipes and mains after the passage of this ordinance, provided the said company shall have erected its gas works, laid down its mains, and be prepared to supply the citizens with gas within two years after the approval of this ordinance; and this ordinance and all rights and privileges granted thereunder shall be null and void should said company fail to keep or perform each and every provision of this ordinance in each and every particular.

"Tenth. That for the faithful performance of all the provisions of this ordinance the Citizens Gaslight Co. shall execute a bond with good security to the amount of $75,000, to be approved by the mayor and general council. And that within two years there shall be an investment made by said company in works and mains equal in value to the sum of $75,000."

Subsequent to this ordinance the city council by resolution extended the time for the performance of these conditions two years longer.

In the first place the right of appellant to have the cloud removed from its franchise was precedent to and independent of any consent on the part of the city to the opening of the streets to lay its pipes and mains. On the passage of the charter and its acceptance by appellant it became seized of a property right in the franchise for the protection of which it had the right to invoke the aid of a court of equity. As to whether appellant could or not obtain the consent of the city council was a matter with which appellee had nothing to do. So long as the consent might be obtained it did not lay with appellee to claim that the consent had not been obtained, particularly as the claim of exclusive right on the part of appellee might have been the cause of preventing the consent. Secondly, the franchise of appellant was valuable without the consent of the city council to the tearing up of streets to lay down pipes and mains, as the business of the corporation might have been carried on without disturbing the soil of the streets. Thirdly, all the conditions contained in the ordinances, except it may be that of giving bond, are conditions subsequent to the consent of the city council, and as to the matter of the bond, that is an affair between the city and appellant, with which appellee has nothing to do. Fourthly, the charter of appellant does not require that the consent of the city shall be obtained by ordinance, and although such consent was so obtained, and although it may be conceded that an ordinance can not be continued in force after its expiration by resolution, yet as the city council had the right to waive the forfeiture for noncompliance therewith, the resolution is an express and unimpeachable waiver. Even if it be conceded, which is not, that

appellant had no right to tear up the streets and lay down its pipes and mains without the consent of the city council obtained previously to the assertion of claim in opposition to the exclusive right insisted upon by appellee, it is clear that appellee has no such right to tear up the streets and lay down therein its pipes and mains even with the consent of the city council, for the seventh section of its charter granted in 1867, and which gives this right, is expressly repealed by the third section of the act of 1869 amendatory thereof. The language of the third section of the act of 1869, repealing the seventh section of the act of 1867, is plain, emphatic and unequivocal, and leaves no room for speculation as to the intention of the legislature in the use of such language. The repeal of this section of appellee's charter does not affect the rights of appellant, because he must recover on his own title, but it illustrates the fact that the consent of the council, under legislative grant, to the tearing up of the streets to lay down mains and pipes has not been considered essential to the supply of gas to the city and to the citizens of Louisville, since appellee has continued in operation without such authority since the 22d of January, 1869.

Appellant objects that the charter of appellee granted by the act of 1867, entitled "An act to extend the charter of the Louisville Gas Co." is unconstitutional and void because it fails to comply with the requirements of section 37 of article 2 of the State Constitution, which provides that "no law of the general assembly shall relate to more than one subject, and that subject shall be expressed in the title."

If this act had been an act, entitled An act to "incorporate," instead of to "extend," the Louisville Gas Co., it is probable that no point would have been made, in view of the decisions in this State. The general subject embraced in this act is the manufacture and supply of gas to the city and citizens of Louisville, and that subject is as well indicated by the term "extend" as it would be by the word "incorporate," for while the act of 1867 creates a new company under the old name, the terms of the two charters are substantially the same, and all the terms of each have a natural relation to and connection with the same subject, that is, the manufacture and supply of gas. The act is not unconstitutional on this ground. (Louis-

ville & Oldham Turnpike Road Co. v. Ballard, 2 Met., 168; Phillips v. The Covington Bridge Co., 2 Met., 222; McReynolds v. Smallhouse, 8 Bush, 453.)

The next question presented by appellant is whether that portion of the charter of appellee granting the exclusive right to manufacture and supply gas is forbidden by the first section of the 13th article of the State Constitution, which is as follows:

"That all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services."

We are of the opinion, both on principle and authority, that such legislation is forbidden by the provision of the Constitution quoted.

The authority for this conclusion seems to be ample in this State. Gordon, &c. v. Winchester Building Association, 12 Bush, 110, is in point. At the time of the passage of the charter of the association the general law forbade, under penalty of the forfeiture of all the interest, the charging of interest at a greater rate than ten per centum per annum. The charter authorized the association to charge more than ten per centum, and this court declared the act unconstitutional, because it granted to the association an exclusive privilege without the consideration of public services on the part of the association. The case under consideration is more certainly within the constitutional inhibition, because the terms of the charter expressly excludes any other persons or corporation from the enjoyment of the privileges granted to appellee. In the Gordon case it might well be said that the privilege was an exceptional or special privilege forbidden only by the general law, while here it is expressly declared to be exclusive. But whether the privilege is exceptional, special, or exclusive, it appears to be equally denounced by the Constitution as decided in the case of Smith v. Marden, MS. opinion of this court, January 20, 1883, 4 Ky. Law Rep., 553. In that case it was held that a special act giving a clerk a longer time within which to collect his fees than was allowed by the general law to other clerks was unconstitutional. It is true the opinion is not in terms based upon this provision of the Constitution, but it is clearly

not maintainable upon any other ground unless it be that the special act was not in the exercise of a legislative authority, and, therefore, unconstitutional, because beyond the limits of that department of the government, and consequently void as an arbitrary exercise of power. Whether that case be founded upon the one or the other of these grounds is immaterial, as both reasons exist in the case being considered for declaring that portion of the act unconstitutional which gives the exclusive privilege.

In the case of The Norwich Gaslight Co. v. The Norwich City Gas Co., 25 Conn., 1, an exclusive right of this kind, under legislative grant for fifteen years, was claimed and denied, the court holding that whether it was within the provisions of the Bill of Rights which provides that "no man or set of men are entitled to exclusive public endowments or privileges from the community," the grant was clearly a monopoly, and as such contrary to the whole theory of free governments, and, therefore, unconstitutional and void.

Appellee contends that although the grant of the exclusive privilege may come within the constitutional inhibition, it is saved by reason of the fact that it performs a public service by the requirement to reset gas posts at specified intervals for lighting the streets, and for which the company are to receive a specified compensation. This is no public service within the meaning of the Constitution. This charter in a like manner regulates the price of gas to be supplied to individual consumers, and reserves, as in the Norwich gas case, the right of individuals to manufacture gas for private consumption on their own premises. And in that case it is said: "But it is no part of the duty of the government to provide the community with lights in their dwellings any more than it is to provide them with dwellings themselves, or any of the necessaries or luxuries which may be deemed important to the comfort or convenience of the community." It may be, with equal propriety, said that there is no more duty on the government to supply lights on the streets by gas or otherwise than to furnish such lights for the convenience of the public on the public highways of the State; nor is it any more the duty of the government to furnish such lights than to furnish telephonic fire alarm or tele-

phonic communication to the citizens. All these matters are of municipal control, under the supervision of the local government, and not in any sense a duty devolving upon the State or general government.

It is not questioned that the legislature may grant a franchise to a corporation or a right to an individual upon the faith of which rights and interests may be acquired, which may ripen into an inviolable contract; but in all such cases there must antecedently exist in the legislative department the constitutional power to make such grant. If the power does not exist the grant is a nullity, and no rights can be acquired on the faith of it. The grant is void ab initio, and is of no more effect than if such legislation had not been attempted. Charter rights in such cases stand exactly on the same basis as the rights of natural persons. The creation of a corporation by legislative act is the creation of an artificial being which, when brought into existence, must be treated, in reference to rights and privileges, as a natural person.

The cases relied upon by counsel for appellee in support of the doctrine that exclusive privileges or monopolies may be granted to the exclusion of subsequent control by the legislature are all from States where there is no such constitutional provisions as that quoted from our Constitution. For instance, the Slaughter House Cases, 16 Wall, 36, from Louisiana, where a monoply was sustained by a majority decision of the Supreme Court. In the Constitution of Louisiana there is no such provision as is found in our Constitution, but there is a provision that an exclusive privilege or monopoly shall not be granted for a longer period than twenty years; so in the cases cited from Wisconsin there is no provision, and in reference to the cases from Ohio, relied upon by counsel for appellee, there is not only no inhibition in the Constitution against such legislation, but, on the contrary, there is a constitutional provision which, by implication, authorizes the granting of exclusive privileges. The language of that Constitution is that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the legislature."

The case of the Louisville & P. R. R. Co. v. The Louisville City Railway Co., 2 Duvall, 175, is not in point: First, because

the question as to whether one railroad, as distinguished from another railway, could be run under legislative grants on streets over which the railroad had been granted the exclusive right to construct its road, was not presented; and, second, because the grant to the railroad was for the benefit of the Blind Asylum, and was the exercise of a governmental function, and, therefore, supported by the consideration of public services.

It is insisted that this legislation is not more within the constitutional inhibition than exclusive grants for ferries, bridges and turnpikes, and it is sought to justify it upon the same principle. That kind of legislation does not sanction this. It is essentially different in principle. The granting of ferry privileges, the authority to build bridges and to make turnpikes, is the exercise of a governmental function, and usually requires the exercise of the power of eminent domain, and are granted in consideration of certain services to be performed for the benefit of the public. Such means of intercommunication are necessary, in order that the citizen may perform his duty to the government and to facilitate commerce. The existence of this necessity and the existence of the fact that ordinarily these things can not be done without the exercise of the right of eminent domain renders it the duty of the government to make the grant, and in doing so it may attach such conditions to the grant as it may deem proper, but in all such cases there is a public service or duty to be performed by the grantee. He furnishes the facilities for communication which existing necessity made it the duty of the government to do, and is to that extent acting for the government.

It is upon the same idea of the exercise of a governmental function, and the performance of a service to the public, that all the lottery grants in this State have been sustained. In every instance where such grants have passed under review in the courts, and have been approved, they have been created for the ostensible purpose of establishing schools, libraries or wharves for the public convenience. All these things, when carried out, are public services, and result in the performance of rights and duties which devolved upon the government.

The furnishing of educational facilities, as furnishing means of communication, by which the citizen may perform his duties to the State, is the exercise of governmental functions and duties which may properly be delegated to every person or corporation to be performed for the government, and upon such conditions as the government may prescribe. It is upon this principle that the grant to the Green and Barren River Navigation Co., in Smallhouse v. McReynolds, &c., 8 Bush, 447, was sustained. The company performed a public service by keeping the public works on the rivers in repair, and thus furnishing that facility for commerce which it was the right and the duty of the State to do.

The theory of all free governments, whether under a written Constitution or not, is equal rights, equal privileges, and equal capacities to every citizen in the acquisition of property, and in the preservation of life, liberty and property. This legislation, granting the exclusive privilege, violates that spirit as well as the letter of the Constitution, and the construction contended for by appellee, where carried to its logical and legitimate result, would cause incalculable harm.

If this section of the Constitution does not apply to this class of legislation, there is nothing in the letter of the Constitution to prevent the legislature from creating any character of monopoly for the aggrandizement of a private individual or corporation. Suppose a general law should be passed forbidding the sale in the State of any given commodity, and an act should be subsequently passed authorizing a particular person or corporation, for his or its personal good, to trade in this commodity, or in the act itself the right should be made exclusive in terms. Such a grant would certainly be void, and we think, under the express letter of the Constitution; but if not void for that reason, it would be void, because an arbitrary and tyrannical act not within the scope of legislative authority.

It is not true that the courts can not declare an act of the legislature unconstitutional or void unless expressly forbidden by the letter of the Constitution. The Constitution divides the government into three departments, legislative, executive and judicial, and provides that neither of these departments shall exercise any power properly belonging to either of the

others. The Constitution does not undertake to define what the powers or duties of these several departments are, but leaves them to be determined by the maxims of Magna Charta and common law; so that whatever act of the legislative department (which we are alone considering) that is not so approved is outside of the pale of legislation and absolutely void. For instance, the legislature can not authorize the property of one individual to be taken and transferred to another; it can not make one an arbiter in his own case, nor can it, under the guise of taxation, confiscate the property of the citizen. Not because any of these things are expressly forbidden in the Constitution, but because it is outside of the delegated authority, which is only legislative, and they are, therefore, arbitrary and despotic, belonging to no department of any free government.

It appears to us that the act relied upon, giving the exclusive privilege, is likewise outside the limits of legislation, and for that reason void.

Whether that portion of the act of 1869, giving to the Louisville Gas Co. an exclusive right to manufacture and supply gas to the city and citizens of Louisville for twenty years, is unconstitutional, because in violation of the first section of the 18th article of the Constitution: or because beyond the authority of legislation as recognized at common law, it is insisted, and we think upon good ground, that the portion of the act of 1869 granting the exclusive right is repealed by the charter of 1872 granted to appellants.

The eighth section of chapter 68, General Statutes, is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The amendment of 1869 appears to have been passed for no other purpose than that of giving to appellee the exclusive right claimed, since it imposed no new duties, sufficient as a consideration, to support the grant. The only difference between the acts of 1867 and of 1869 is, that under the act of

1867 the company was bound to extend its main pipes when the public and private lights would pay eight per centum profit, while the act of 1869 requires only a profit of seven per centum; and while in the act of 1867 the company is required to supply lights on the streets at actual cost of manufacture, the act of 1869 in addition provides that each of such lights shall not exceed the price of $35. As already stated, the act of 1867 had been accepted and was being acted under at the time of the amendment of 1869, so that there appears to be nothing to prevent the exercise of the right of repeal reserved to the legislature by the act of 1856 unless it is the last section of the act of 1869, which provides "that no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company." There is nothing else in the act of 1867 or of 1869 "plainly expressing," or even explaining by implication, the intention to make the franchise irrevocable within the limitations of the act of 1856. This section was clearly not intended to be a limitation upon the legislative power of repeal, but was intended to regulate the respective rights of the city and the gas company, so that neither, without the consent of the other, could call upon the legislature to exercise its right of alteration or repeal. The grant of the "exclusive" privilege for twenty years to manufacture and supply gas does not express or imply a restraint upon the legislative power of repeal or alteration any more than the terms of the charter of 1867, which limits the life of the company to twenty years. The inviolability of charters rests upon the ground of executed contracts supported by a valuable consideration. Here there was no consideration for the grant of an exclusive privilege, since the Louisville Gas Co. had already accepted the charter, binding it to the performance of the duties imposed by the amendment of 1869. The act of 1872, incorporating appellant, being in conflict with the grant of an exclusive privilege to appellee, necessarily repeals that portion of appellee's charter, but in no way interferes with its rights in other respects.

There is another reason, outside of the constitutional question, that the exclusive right asserted by appellee should not

be recognized. If, as insisted by counsel for appellee, the act of 1867 is the grant of a new charter to the old corporation created in 1838, that corporation has the exclusive right for fifty years to manufacture and supply gas to the city and citizens of Louisville. Such a grant of a monopoly was not recognized at common law. It is a restraint upon trade, destroying competition essential to the welfare of the public, as in other occupations and business, and incompatible with the growing interests and necessities of commerical centers.

We may further say that if it be admitted that the supplying of gas on the streets, for which the company receives compensation, is the rendering of a public service, which would entitle appellee to the exclusive privilege of manufacturing gas, there is certainly no constitutional or common law reason why the citizens of Louisville should be restrained of their right to purchase that commodity where it can be most cheaply obtained, as that right unquestionably exists in all other branches of trade and commerce.

Judgment reversed and cause remanded, with directions to issue a perpetual injunction restraining appellee from claiming and exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville.

Judges Lewis and Pryor delivered the following separate opinion:

Without entering into the discussion as to the meaning of exclusive, separate public emoluments and privileges contained in section 1 of the Bill of Rights, it seems to us that the question of exclusive rights can have but little, if any, application to a contract made between the State and the citizens, by which certain privileges are conferred by reason of an adequate consideration, of which the legislature is to be the sole judge, moving from the citizen in undertaking to discharge a public duty or render a public service. In such a case the consideration rendered, or to be rendered, the public will uphold the grant. It is a mere question of contract rights, and both the State and the citizen must abide by its terms as much so as if it had been entered into between individuals. The case of the Norwich Gaslight Co. v. Norwich City Gas Co., supra, is based

on the idea that the State is not compelled to improve a particular higwhay, but where it undertakes to do so, and contracts with the citizen to perform the work, it becomes a binding obligation on both parties. The municipality of the city of Louisville, being a part of the State government, the necessity for gaslights upon its streets and in its public buildings is almost as essential as the streets that are lighted by it. It is a public necessity, and when a contract is made to supply this public necessity with gas for a limited and reasonable period, and that does not by its terms create what is termed a monopoly at the common law, the contract is binding. We concur in the conclusion reached that the last charter of the appellee is within the operation of the act of 1856, but can not adjudge that the grant for a limited period of an exclusive privilege to the citizen or corporation, in consideration of such services as were to be rendered the public in this case, is in violation of section 1 of the Bill of Rights. Nor do we think the cases in this State cited by our associates, where the grant was a mere gratuity or was held invalid, in the one case at least, by reason of its being exceptional legislation, sustains the views presented in the principal opinion.

Wm. Lindsay, Beattie & Winchester, Barrett & Brown and Bijur & Davie for appellant.

Goodloe & Roberts, T. L. Burnett, I. & J. Caldwell & Winston and A. P. Humphrey for appellee.

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## PEPPER, &c. v. PLANTERS NATIONAL BANK OF LOUISVILLE.

(Filed June 16, 1883.)

**1. Duty of cashier—The cashier of a bank undertakes to supervise the action of his subordinates in their work in so far as is consistent with the discharge of his other duties.**

**2. Estoppel—Though the board of directors periodically examined into the affairs of the bank and reported its condition all right, this did not stop the bank from holding the cashier liable for any fraud perpetrated by a subordinate, if by exercising due care and diligence the cashier could have prevented such fraud.**

**3. Experts—Experts are competent witnesses to testify as to the character of duties and labors performed by cashiers in banks generally. But they are incompetent to say whether particular acts done or omitted to be done by a cashier in the case on trial constituted negligence.**

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

This is the second appeal in the present case, and is an action in which the plaintiff, the Planters National Bank of Louisville, is seeking to make Batchelor, who was its cashier, and his sureties liable for large sums of money abstracted from the bank by the employes under Batchelor, the entire loss, so far as the present record shows, having been sustained by the dishonest conduct of one Rehm, who acted in the double capacity of teller and general book-keeper for the bank.

In March, 1865, Batchelor was acting as cashier, teller and book-keeper, and the business of the bank increasing, Rehm was finally made both teller and book-keeper. This relieved the cashier from some of the duties assigned him, and the fact that Rehm having been placed in a position by being made both teller and book-keeper affording him (if dishonest) increased facilities for perpetrating his wrongs upon the bank, did not lessen the duties of the cashier or increase his di gence. If the subordinate was placed in a position where he could defraud the bank without being detected, unless by the exercise of the highest degree of diligence, the default is not that of the cashier, unless he has had knowledge of the fact that such frauds were being perpetrated. The cashier undertakes to supervise the action of his subordinates in their work in the bank in so far as is practicable with reference to the discharge of his other duties. The diligence required is such as a skilled and prudent cashier in such institutions ordinarily bestows on the affairs of the bank, and such care and diligence must be the test by which his liability is to be determined. The fact that the board of directors were required every three months to appoint a committee whose duty it was to examine into the affairs of the bank, count its cash, compare its assets and liabilities with the balance on the general ledger, and whether or not the bank was in a solvent condition, and that this committee reported the condition of the bank all right, does not work an estoppel against the bank in the attempt to make the cashier liable for a neglect of duty.

While the cashier is in most instances under the control of the directory, he is selected by them on account of his skill as a bank officer, and one to whom can be intrusted the supervisory power over the affairs of the bank; and, therefore, the failure of the bank directors or committee to ascertain the fraud is no excuse for the cashier, if, by the exercise of ordinary care and diligence, such as was practicable in view of the proper discharge of all his duties to the bank, he could have prevented that fraud. But while evidence tending to show negligence on the part of the bank's committee in investigating the affairs of the bank constitutes no defense for the negligence, if any, of the cashier, many of the instructions given for the plaintiff were calculated to mislead the jury. The jury had been told in instruction No. 2 that the want of diligence on the part of the directors did not excuse Batchelor for neglecting his duty, and then the court proceeded in subsequent instructions to single out the negligence on the part of the directors that did not excuse. In instruction No. 3 the jury was told that the failure to take a bond from Rehm constituted no defense; in instruction No. 4 that the appointment of Rehm to the position of book-keeper and teller did not lessen the obligation of Batchelor or increase his care; and again, in No. 12, it is the right of the directors to assign to a subordinate more than one position in the bank, if, in their opinion, he could discharge such duties, and that this did not affect the question of liability on the part of the cashier or his sureties.

The singling out by separate instructions the several acts or omissions of duty on the part of the directors. and telling the jury that this and that did not excuse, conduced to call the attention of the jury from an essential element of the defense, viz., that the entire action of the board with reference to the duties the cashier was required to perform, and those of Rehm, made it impracticable for him, as cashier, to give to the work of his employe that attention that a cashier ordinarily would have done. The duties to be performed by Batchelor and to be discharged by Rehm may have been such as required of Batchelor the exercise of a greater degree of diligence than ordinarily pertains to one in his position; and while the directors had the right to assign to Rehm double positions in the

bank, if that increased the supervisory power of the cashier over the subordinate to a greater extent than that ordinarily required of a cashier over those under him, or gave to Rehm such increased facilities for practicing his frauds as to enable him to avoid detection by the exercise of ordinary diligence on the part of Batchelor, then Batchelor and his sureties are not responsible.

The instructions referred to had the effect of taking from the jury the entire evidence for the defense, conducing to show diligence, and to create the liability notwithstanding the cashier did all that was required of him in such a position. The instruction had the effect to make prominent the testimony of the one side, and omitted to do so on the other. This case having been heretofore in this court, the facts affecting the issue were fully discussed in an opinion then delivered; but the reasoning of the court embodied in an opinion should not always be given to the jury in the form of an instruction. The principle of law applicable to the case, and to such parts of it as the jury can not understand without being advised, should be embraced in an instruction; but isolated facts bearing on the main issue, made prominent by telling the jury they must or must not consider them, seldom fail to mislead.

The general instruction in regard to negligence having been given, and the jury told that the negligence of the directors did not relieve the cashier from discharging his duty, the jury must have understood the issue. The court having made prominent in several instructions evidence for the plaintiff conducing to the recovery, might, with the same propriety, have said to the jury for the defendants that the failure of the bank committee to ascertain the fraud, and their several reports as to the condition of the bank, should be considered as evidence showing diligence on the part of the cashier, all of which would have been misleading.

While negligence on the part of the directors affords no excuse, diligence on their part may evidence an absence of negligence on the part of Batchelor. Such deductions counsel may present to the jury in their argument, but they should not find their way into an instruction. Instructions 5 and 6 are both objectionable. The jury was told in each instruction that if the negligence or want of care caused the loss to the bank, or

aided such defaults, the defendants are liable. What constitutes aiding such defaults is not easily determined from the instructions or from the facts of the record. If it is meant that if Batchelor participated in the fraud, and the defendants are liable, the jury should have been so told, and, therefore, so much of the two instructions as left the jury to determine the character of the aid afforded by Batchelor to the employe under him, by which the latter was enabled to practice the fraud, should have been refused. The eleventh instruction in regard to the duty of Batchelor to make a report of the actual condition of the bank to the comptroller of the currency raised a side issue between the comptroller and Batchelor that shed no light on the question of negligence in this case. The tenth instruction asked in reference to the demand had been heretofore decided adverse to the appellants, and was properly refused.

The fact of Rehm having defrauded the bank and abstracted the money seems to be conceded. The issue in this case is plain and simple. It was the duty of Batchelor to exercise such skill and prudence in supervising the action of his employe as is ordinarily bestowed by such officers in supervising the work of those under them, and if Batchelor failed to exercise that diligence in regard to the action of his subordinates as was consistent and practicable with the proper discharge of all his duties in connection with the bank, the defendants are responsible; and if the converse of the proposition be true, no liability exists. This being the law of the case, instruction No. 1 for the plaintiff should be so extended as to define the sort of diligence required of the cashier. As it is presented the jury is told that if the loss was from the want of care on the part of Batchelor the defendants are liable; whether slight care, ordinary care, or great care, the jury is not told; and while this is contained in other instructions, this instruction, if given, should embody the law as to the diligence required.

It is proper to consider the competency of what is termed the expert testimony in the case. Certain witnesses were summoned as bank experts, and were permitted to give their opinions, to the effect that the cashier was guilty of negligence. It was important that the court and jury should have been in-

formed as to the duties required of a bank cashier, embracing not only his supervision of the work done by those under him, but all his other duties connected with the bank. The daily routine of the business connected with such a bank may have been unknown to the judge presiding or to the jury, and to enlighten the jury as to the character of duties and the labor to be performed no witness could be more competent than one familiar with the labor and duties of a cashier in similar institutions, and to this extent the witnesses were entitled to speak. Such facts must be shown in order that the jury may determine intelligently the issue made. When in possession of these facts, and then ascertaining from the testimony the character and manner of the fraud practiced by the subordinate, the juror must be allowed to say, and not the witness, whether the loss sustained by the bank resulted from a want of diligence on the part of the cashier. The witnesses were not in fact experts, but state facts from which conclusions may be reached by the court and jury, and this is no reason why the ordinary mind should not be able, after hearing the testimony, to determine the question of negligence. The expert, says Wharton, is introduced, and testifies to conditions that can not be verified by the tribunal trying the case. One unacquainted with questions of science or skill is incapable often of forming a logical conclusion from scientific facts, and in this class of cases the expert is resorted to for his opinion or conclusion, and the text-books restrict this rule by saying: "In all matters as to which the lay mind is capable of forming a conclusion or logical inference from scientific facts the expert can not give his own conclusion from the facts" (1 Wharton's Evidence, section 436). There is no reason why the juror can not reach a logical conclusion in this case when hearing the testimony on both sides of the issue made, and when the witness is permitted to state that the cashier has been guilty of negligence from the facts proven, or from a supposed state of facts, he is in effect deciding the law of the case for the court, and the issue of the fact for the jury. The opinions of witnesses, therefore, that certain acts were done by a cashier, or omitted to be done, constitute negligence, should have been excluded from the jury, and for the errors in admitting this

testimony, as well as the other errors indicated in the opinion, the judgment below is reversed and cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

Wm. Lindsay, John M. Brown, Jas. Harlan, Alvin Duvall, J. & J. W. Rodman and J. B. Kinkead for appellants.

Goodloe & Roberts and Russell & Helm for appellees.

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## BASYE v. ADAMS, &c.

(Filed June 16, 1888.)

1. Insurance—A policy of life insurance, by which it was agreed that upon the death of the insured certain benefits should accrue to his "legal heirs or beneficiary," can not be sold or assigned so as to transfer those benefits to a stranger.

2. Insuring life of another—One who has no interest in the life of another can neither take out a policy of insurance on that other's life nor obtain by purchase, assignment or otherwise a policy already taken out on that other's life.

3. In this case appellant, who bought the policy, is allowed to retain out of it only the amount paid by him for it, the balance is to be paid the deceased's heirs.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

September 13, 1878, the National Mutual Benefit Association, in consideration of the payment by him of $6 membership fee, $2 annual fee, and his agreement to pay the further sum of $2 on each anniversary of his membership, and $3 within thirty days after the death of any member of the association, issued and delivered to J. R. Throckmorton a certificate of life membership in said association, in which it was agreed by the association to pay to the estate of said Throckmorton, within sixty days after proof of his death, such sum as might be realized from an assessment on all surviving members of the association, as provided in the sixth section of the charter.

On March 3, 1881, in consideration of $500, $50 of which was in discharge of an existing debt, and the balance cash paid, Throckmorton, by a writing annexed to it, assigned to appellant Basye the certificate "and all the benefit and advantage to be derived therefrom." And thereafter appellant paid all dues and assessments, which Throckmorton had, in considera-

tion of the certificate and as a life member of the association, agreed to pay, amounting to $68, and also expended the sum of $55 in procuring formal proof of the death of Throckmorton.

The amount found due and payable by the association after the death of Throckmorton, which occurred in July, 1881, is the sum of $4,000. And whether that sum, which was deposited, subject to the disposal of the court, by the association, should be paid to the administrator of his estate, who is the plaintiff in the action, or to appellees, his legal heirs, or to appellant as the assignee of the policy, was the question presented and decided by the lower court.

The chancellor rendered judgment for the repayment to appellant Basye out of the fund in court the sum of $500, the consideration paid for the assignment of the policy, and the other two sums advanced and paid by him subsequently, and to appellees, legal heirs of deceased, the balance of the amount, and of that judgment both Basye and the heirs complain, each party claiming to be entitled to the whole. As the administrator has not appealed, and it does not appear from the record that there are any creditors of the estate of deceased unless appellant may be regarded as one, the issue to be here determined as to the ownership of the fund is between Basye and the heirs.

The National Mutual Benefit Association was, by an act of the general assembly approved April 6, 1878, created a body-corporate, with the right to acquire and hold real and personal property, not exceeding $100,000; to make contracts; sue and be sued, and to transact all business for its corporate purposes, and power was also given to it to confer charities as prescribed in the charter or as the president and directors may determine.

By section 2 of the charter it is provided that the persons named therein may constitute a board to do business and organize and receive as members all clergymen, physicians, lawyers, their wives, and such persons as may be recommended by a member of either of these professions, of good standing, sound health and constitution, and who shall pass a satisfac-

tory medical examination, and between the ages of eighteen and sixty-five years.

Section 3 provides that each person, on application for membership, shall pay into the treasury of the association certain fees, and "upon the payment of these sums each member shall receive a life-membership certificate * * * which shall express on its face the obligations of such member, and the benefits to accrue to the legal heirs or beneficiary of the same in the event of death."

Section 5 is as follows: "The membership and annual fees paid in the treasury by each member, together with assessments, after paying the legal heirs or beneficiary of a deceased member and the expenses of the association, shall form a permanent fund, which may, at the discretion of the directors, be appropriated to relieving the necessities of sick or disabled members by granting a weekly sum, not to exceed $10 a week, for a term not longer than twenty weeks consecutively, to be paid to such sick and disabled members, or in such charities as they may direct."

Section 6 provides that "upon the death of a member each surviving member shall pay into the treasury the mortuary fee stipulated in the certificate of membership, which sum shall constitute a fund to be paid within sixty days from the date of proof of death to the legal heir or beneficiary of the deceased member, less twenty per cent. to be deducted for permanent fund and expenses."

Section 7 provides that any member failing to pay his assessment within thirty days, as provided in section 6, shall forfeit his membership and all benefits arising therefrom, etc.

Section 8 is as follows: "No part of the interest of any member of the association shall be subject to any debt, liability, or legal or equitable process against them, or which may alienate the benefits from the legal heirs."

The first question to be considered is whether the assignment of the certificate to appellant is valid for any purpose.

It will be observed that the association was incorporated for two distinct objects, and that provision was made in the charter for raising two distinct funds. One of the objects is to relieve the necessities of sick and disabled members, or to confer

charities in the discretion of the directors, and for that purpose a permanent fund is provided for by the charter. The other object is to pay the legal heirs or beneficiary of a deceased member such sum as may be realized from an assessment on all surviving members, less twenty per cent., to be deducted for the permanent fund and expenses.

It will also be observed that it requires the consent of the association to become a member thereof, only certain classes of persons, or those possessing prescribed qualifications being admissible, and that each applicant for membership is required to pay certain fixed fees before being admitted as a member.

It is, therefore, clear that the assignment of the certificate to appellant did not have the effect of investing him with the personal privileges of a life member of the association, or giving him any interest in the permanent fund, which, according to a fair construction of the charter, is to be used for the benefit only of members of the association. It thus follows, if the assignment was valid and effecutal for the purpose it was intended to accomplish, that while appellant was bound to pay all the assessments and fees required of a member to prevent forfeiture of the policy, and was entitled to the fund payable at the death of Throckmorton, the latter still retained all the other rights and privileges of life membership, which appellant did not, nor could possess merely in virtue of the assignment to him.

The fund to be paid upon the death of a member of the association must, according to the charter, be paid to the legal heirs or beneficiary of such deceased member.

It is not pretended that appellant is a legal heir, nor, in our opinion, is he a beneficiary in the sense that, keeping in view the nature and objects of the association, we are required to use that term. For whatever right or interest he acquired, if any, he took by virtue of the contract of assignment and as a purchaser for value, and not as a designated beneficiary.

At the time Throckmorton became a member of the association he designated his "estate" as the beneficiary, and by the terms of the certificate, which embodies the contract between him and the association, the latter agreed to pay to his "es-

tate," and not otherwise, the amount to become due at his death. Whether he could have, by will or otherwise, subsequently designated and bound the association to pay at his death the fund to another person or for another object it is not necessary to now decide. That he could not under the charter sell and assign the policy so as to divert the fund from both his legal heirs and beneficiary we must conclude. And in such conclusion we are fortified by the further fact that no provision is made or authority given in the charter, which must govern, for the sale and assignment of it, or for investing the purchaser or assignee with any of the privileges as a member or interest in the fund payable at the death of the assignor.

But there is another and graver reason why the attempted sale and assignment should not be upheld.

The precise question before us has not heretofore been presented to or decided by this court, nor does there exist in this State any statutory provision on the subject. But, in our opinion, adhering to well known and recognized principles, there need be but little difficulty in determining it. Public policy requires that in all cases it should be essential to the validity of a policy of insurance, obtained by one person for his own benefit upon the life of another, that the party so obtaining the policy should have an insurable interest in the life of that other.

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally herein to be such an interest arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should always be capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. * * * In all cases there must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary or of blood or affinity to expect some benefit

or advantage from the continuance of the life of the aforesaid. Otherwise, the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy. The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." (Harnock v. Davis, 104 U. S., 462; Cammack v. Lewis, 15 Wall., 643; Franklin L. I. Co. v. Hazzard, 41 Black., Ind., 121; Missouri Valley L. I. Co. v. Sturgis, 18 Kansas, 93; May on Insurance, 398.)

Counsel for appellant have cited authorities sustaining the opposite doctrine as respects the assignment of policies of life insurance. But we are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is insured, should not be also applied to an assignment of a policy where the assignee has no such insurable interest.

In this case, while Throckmorton lived, not only was the payment of the amount due at his death postponed, but appellant was compelled, in order to prevent a forfeiture of the policy, to continue to pay the fees and assessments stipulated in the contract of insurance to be paid. He, therefore, had no insurable interest in the continuance of the life of the assured, but was directly interested in its early termination, when he would become entitled to an amount greatly disproportioned to the investment made by him.

It is not a sufficient answer to say that the policy was valid when issued. For if a person "may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling and the same temptation is held out to the purchaser of the policy to bring about the event insured against as if the policy had been issued directly. It is in fact an attempt to do indirectly what the law will not permit to be done directly."

In our opinion, therefore, the assignment to appellant was void as against public policy.

Upon the cross appeal appellees seek a reversal of so much of the judgment as gives to appellant the amount paid by him as consideration for the policy assigned, and the two other sums subsequently paid by him. These amounts were paid by appellant apparently in good faith, and are just demands against the estate of the deceased.

He designated his "estate" as his beneficiary, by which he clearly meant that the amount payable at his death should become assets of his estate to be paid over to his personal representative, and by him disposed of according to the laws providing for the distribution of estates of deceased persons and payment of debts against them. We perceive no reason why under the charter a member of the association may not make such provision for his creditors, his widow or other person as well as, or even excluding, his heirs at law. For clearly by the terms of the charter the right is given to a member to designate any object or person as his beneficiary, excluding any member or all his heirs at law at his will.

In this case, the record showing no other demand against the estate of the deceased besides the amounts adjudged to be paid to appellant, the chancellor did not err in directing the amount to be paid to appellant.

The judgment on both the appeal and cross appeal must be affirmed.

Jas. S. Pirtle and Geo. B. Eastin for appellant.

R. H. Blain for appellees.

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## McLEAN COUNTY PRECINCT NO. 3, &c. v. DEPOSIT BANK OF OWENSBORO, &c.

(Filed June 14, 1883.)

**Equity jurisprudence—Taxation—Under an act of legislature a county subscribed to the stock of a railroad and issued bonds to pay therefor. Under the same act the county judge was authorized to appoint some discreet person, a resident of the county, as collector of the taxes levied to pay the bonds. The county judge being unable to find any such person willing to accept the position of collector, and the bondholders being unable to recover on their bonds under execution, brought suit in equity ask-**

**ing that the taxes be required to be paid into court or into the hands of a collector appointed by the court. Held—The court had jurisdiction to grant no such relief.**

Appeal from McLean Circuit Court.

Opinion of the court by Judge Pryor.

The charter of the Owensboro and Russellville Railroad was so amended as to authorize the voters of any precinct of any county through which the road might be located to vote a tax, and in the way of a subscription, or by a majority petition, upon themselves in aid of its construction, and the county judge was required "to levy a tax, when voted, on the taxable property of the precinct to meet the interest and a reasonable amount of the principal annually."

By the third section of an amendment to the charter, approved the 14th of March, 1869, the county judge, when the precinct had made a subscription to the capital stock of the company, was required "to appoint a collector of said tax so levied for such precinct," and he shall appoint such person or persons as the justices of said precinct may recommend, and if the justices when notified neglect to recommend, the presiding judge shall appoint some discreet person residing in the precinct as collector aforesaid, taking bond from him for the discharge of his duties, etc. The Livermore precinct, No. 3, of McLean county, on a petition of a majority of its voters, subscribed $50,000 of stock, and issued its bonds to the railroad company in payment. The company sold the bonds, and the road, it seems, was never completed. The appellees, holding a number of the bonds and being unable, as is alleged, to recover in an ordinary action, instituted the present action in equity, seeking the aid of the chancellor, upon the ground that the county judge had, in good faith, endeavored to find some discreet person residing in said district to act as collector of the taxes, and could find no one willing to accept the position or discharge the duties of collector; and further averring that no one in the precinct would undertake to discharge the duties of such an office. The plaintiff asks that the taxpayers be required to pay the respective sums due by them into court, or to some one appointed by the court as receiver or collector, alleging that it was a trust fund held for the discharge of the

bonds and coupons issued by the precinct. A rule was issued against the taxpayers, requiring them to pay the money or taxes owing by them into court. They responded to the rule, and also filed answers, general and special, to the proceeding. Their demand was overruled and the response filed deemed insufficient, the rule made absolute, and the taxpayers (the defendants) required to pay the money into court, and, upon their failure to do so executions were directed to be issued and a receiver appointed and invested by the judgment with all the power and authority of a tax collector, as conferred by the act and its amendments authorizing such an appointment by the county judge. The real question presented by the record, and the only one necessary to be determined, is, had the chancellor the power to collect the taxes by his receiver, or the tax collector appointed by him, when it appeared that the county judge could find no one in the precinct willing to accept the office?

That the remedy afforded by the act under which the vote was taken and the stock subscribed was ample and complete for the collection of the taxes imposed for the payment of the subscription, if the county judge could have found some one within the precinct willing to make the collection, is not controverted; but the chancellor below, seeing that the appellees had been prevented from pursuing that remedy, has exercised the power of appointing a collector, and investing that officer with the power of collecting the taxes. That the remedy had been suspended by reason of the failure or refusal of those living within the precinct to accept the office, or had been temporarily obstructed by reason of a defect in the law under which the collection was to be made, did not enlarge the jurisdiction of the chancellor or confer upon him the exercise of such an extraordinary power. In the case of Heine v. Levee Commissioners, 19 Wall., 655, the court said: "But the hardship of the case and the failure of the mode of proceedure established by law is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles." It may be said in that case, as in the case cited, if the jurisdiction of the chancellor is sustained at all, "it must be on the broad ground that because the plaintiff finds

himself unable to collect his debt by the proceedings given him by the act it is the duty of a court of equity to devise some mode by which it can be done." It will be conceded that it is not one of the inherent powers of any judicial tribunal, whether State or Federal, to levy or collect taxes, and when the instrumentalities selected by the law-making power for making such collections ceases to exist, or declines to act, the remedy is in the legislative department of the State government, and not with the judiciary. If the legislation in regard to the collection of taxes, whether for the purpose of affording revenue for the State or of satisfying a debt due to a corporation, by reason of a county or precinct subscription, proves defective or inadequate for that purpose, the remedy is not by applying to a court of equity to cure the defect, but the legislature under the Constitution can alone supply the defect by amended legislation. The judiciary has no power to levy taxes, or to collect taxes, when the officer appointed to collect refuses to do so; or if no one is appointed to collect, the judiciary is powerless to supply the defect. These are all legislative duties, and when the department of the government to which these duties are confided neglects to discharge them, neither the judicial nor executive department of the government can execute such power. If when the legislature fails to make proper laws, or provide the means of collecting taxes imposed, the judiciary may intervene and perform such duties, there is an end to the theory of the powers belonging to each of the three departments of the government, and the necessity for keeping each within its proper sphere for its successful administration no longer exists. It is not necessary to discuss the powers confided to each department—those which are legislative to one; those which are executive to another, and those which are judicial to another—as we regard it as now authoritatively settled that no such jurisdiction belongs to a court of equity.

Counsel for the appellees agree that a State court may exercise such a power when a Federal court must decline to take jurisdiction. This brings us back to the doctrine contended for by counsel, that as the defect in the law exists by reason of State legislation, it is the duty of the State courts to furnish the remedy. The extent of Federal jurisdiction over such

cases is not a question at issue in this case, and, besides, the decisions of the Supreme Court are based alone upon the ground that a court of equity can not entertain such a jurisdiction. In the case of Rees v. The City of Watertown, referred to in 19 Wall., 665, supra, Rees was the owner of certain bonds of the city of Watertown, issued by authority of the State to the Watertown and Madison Railroad Co., sold for its benefit. A judgment was obtained by Rees, a citizen of Illinois, and mandamus afterwards issued to compel the levy and collection of the tax for the payment of the subscription, and the city officials defeating the efforts of the plaintiff to coerce payment by resigning their offices, a court of equity was appealed to, in which the Federal court was asked to appoint its marshal to levy and collect the tax, and the Supreme Court held that a court of equity had no such power. "A court of equity (says the court) can not, by averring that there is a right, but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts, not only upon established principles, but through established channels." In the case of Heine v. The Levee Commissioners, supra, reported in the same volume, the doctrine was again recognized, the commissioners to make the levy having resigned and a court of equity appealed to for relief, it was held that the power to levy and collect taxes is a legislative provision, and does not belong to a court of equity. In Barkley v. Levee Commissioners, 93 U. S., 258, where the officers authorized to make the levy resigned, or ceased to exist, the court said: "Nor can the court authorize the marshal to levy taxes in such a case, nor in any case, except where a specific law authorizes such a proceeding."

In the case of Merriwether v. Garret, 102 U. S., 472, the legislative act chartering the city of Memphis having been repealed and taxes having been levied before the repeal, an attempt was made to enforce the collection by bill in equity in the United States Circuit Court for the district of Tennessee, and on an appeal to the Supreme Court it was held that no such power existed, and that the remedy, and only remedy, was by an appeal to the legislature to grant the relief. A distinction was taken by some of the members of that court, and a very proper one, too, between mere contract obligations and

the collection of taxes for the support of the government, which is for some special purpose authorized by it. The right of a court of equity to enforce the contract of the corporation, and subject to the payment of the debt the property of the corporation, was recognized in the opinion of Justice Field upon the ground that its property was a trust fund, pledged to the payment of its creditors; and on the other hand that taxes levied, but not collected when the dissolution of the corporation took place, were not the property of the corporation, and a court of equity, through officers of its own appointment, could not proceed to the collection in order to satisfy the demand for the payment of which the taxes had been levied.

In the case of Wolf v. The City of New Orleans, 103 U. S., 358, where bonds had been issued by the city in aid of a railroad company under legislative authority, and the power of taxation given to enable the city to pay the debt, it was held that this delegation of power could not be revoked so as to prevent the bondholder from compelling the city to make the levy by its properly invested authorities; but this case does not determine or recognize the power in the chancellor to appoint municipal officers whose duty it was to levy and collect the tax in the event they had resigned, but only recognizes the right of compelling those in authority to execute the law. We perceive no distinction between the present case and that of Rees v. The City of Watertown, or Heine v. The Levee Commissioners, supra.

In the case of Thompson v. Allen County, 4 Ky. Law Rep., 98, Justice Matthews of the Supreme Court, then holding the United States Circuit Court, held where a special tax had been levied in pursuance of a mandamus, and where no suitable person could be found as collector in the county, and that fact appearing that the holder of the bonds was not entitled to relief upon such a ground, "the collection of a tax belonging as common to the authority of the State, as its levy and assessment and the reasons which forbid a court to supply the latter, apply with equal force to the former. The jurisdiction of courts is confined to compelling the State officers to perform their duties under State laws, and no substitute can be invented."

In Pennigton v. Woolfolk, &c., 79 Ky., 18, this court said: "The power to enforce taxes is legislative, and can not be conferred under our Constitution upon a judicial tribunal."

In Johnson v. The City of Louisville, 11 Bush, 527, the right to proceed in any other mode than that provided by the statute was denied, and where a judgment for taxes has been rendered by a judicial tribunal in any of the cases referred to in the consideration of this question, it has been by reason of mere legislative authority providing such a remedy where the ordinary remedy proves inadequate. Nor is it to be presumed that the legislative tribunal to which the appeal must be made, after authorizing the imposition of the taxes for a special purpose, will permit the credit of the State, or a portion of the State, to be impaired or affected by refusing to lend its aid to the creditor to enable him to collect a debt, whether by taxation or otherwise, entered into in good faith, and acquired by the creditor from the corporation for a valuable consideration. What may be the legislative action on the subject is not, however, a question for this court, and we are satisfied the chancellor exceeded his power in rendering a formal judgment against the taxpayers, and in appointing a collector of taxes for the precinct.

The entire judgment is, therefore, reversed, with directions to dismiss the petition without prejudice.

Charles Eaves, M. C. Givens and C. W. Cook for appellants.

W. N. Sweeny & Sons and Weir, Weir & Walker for appellees.

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## RAINWATER v. COMMONWEALTH.

(Filed June 14, 1883—Not to be reported.)

1. Continuance—Where a party fails to have a witness summoned or recognized to appear at the trial he can not claim a continuance on account of the absence of such witness, and the admonition of the court to the witness to be present does not dispense with the necessity of the summons or recognizance.

2. Manslaughter—Instruction—Upon an indictment for manslaughter the jury should not be instructed that if they believe the defendant killed the deceased in the sudden heat of passion, then they must find him guilty of manslaughter, though he may have done the killing in his necessary self-defense.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

Appellant being indicted for the murder of Aden Donell, the jury returned a verdict of guilty, and fixed his punishment in the State penitentiary for a period of twenty-one years, and judgment having been rendered in accordance with it, he has appealed to this court.

Appellant having failed to cause the witness, Blain, to be recognized or summoned to appear at the trial, was not entitled to a continuance on account of his absence when the case was called. The admonition of the court to the witness to be present at the trial did not dispense with the necessity of appellant using due diligence and the means provided by law to procure the attendance of the witness.

It is next complained that the court improperly instructed the jury.

The court in the first instruction told the jury in substance that if they believed from the evidence the defendant willfully, and with malice aforethought, shot and killed Aden Donell with a pistol, not in his necessary, or apparently necessary, self-defense, they must find him guilty of murder.

And in the fourth instruction they are told that unless they believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed said Donell wilfully, with previous malice and not in his necessary or, apparently necessary, self-defense, they must find him guilty of murder.

Neither of these two instructions is objected to by appellant's counsel. But it is contended that the court erred to his prejudice in refusing, upon his motion, to insert in instruction No. 2 the words "or apparently necessary self-defense," and to add the same words at the close of instruction No. 5.

No. 2, as given, is as follows: "That if they do not believe defendant shot and killed said Donell with previous malice, but do believe from the evidence, beyond a reasonable doubt, that defendant shot and killed said Donell without malice, but in sudden heat of passion and not in his necessary self-defense, in that case they will find him guilty of manslaughter, etc."

Instruction No. 5 is the converse of No. 2, as No. 4 is the converse of No. 1, and is as follows: "Nor will they find him guilty of manslaughter unless they believe from the evidence,

beyond a reasonable doubt, that the defendant shot and killed deceased not in his necessary self-defense."

As the instructions stand the jury are substantially instructed that, although they may believe the killing was wilfully and maliciously done, still they are not authorized to find him guilty of murder if the act was committed in his apparently necessary self-defense, while if they believe the defendant shot and killed deceased without malice, and in sudden heat of passion, they must find him guilty of manslaughter notwithstanding he may have shot in his apparently necessary self-defense.

The jury was hardly authorized to find the defendant guilty of murder, for the evidence tended to show that the killing was done in a sudden affray, without previous malice, and that the deceased, being under the influence of liquor, first assaulted appellant, and was upon him when shot. Therefore, applying the law so as to give the defendant the right to act upon apparent necessity, in one state of case, and to deny him the right in the other, served to more positively and directly, than would otherwise have been the case, call the attention of the jury to the fact that they were required to find him guilty of manslaughter unless the killing was actually necessary to save himself. Besides, one of the witnesses states that the deceased was not at the time armed; that he, witness, had his barlow knife. But the evidence does not show that appellant was aware of that fact. Still under the instruction the jury were required to convict him of manslaughter notwithstanding he may have killed his assailant in his (appellant's) necessary self-defense. The instruction should have been amended as asked by appellant's counsel, and he should have had the full benefit of the law of self-defense, which he did not have as the instructions were given to the jury.

Instruction No. 7 was not only unnecessary, but, under the circumstances of this case, was calculated to prejudice the rights of appellant and deprive him of a fair trial.

It is to be presumed that the jury knew, without an admonition from the court, that it was their duty to carefully weigh and consider the evidence, and reject and disregard such as they did not believe to be true. And, in view of the fact that there was an attempt to contradict one of the witnesses for the

defendant—the only one who saw the killing—and that there were brought out by the Commonwealth statements made by appellant favorable to himself, the instruction was calculated to prejudice the minds of the jury against the appellant and the evidence favorable to his defense.

The judgment of the court must be reversed and cause remanded for a new trial in conformity to this opinion.

C. W. Lester for appellant.

P. W. Hardin for appellee.

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## KENTUCKY SUPERIOR COURT.

## SKAGGS v. HINES.

(Filed May 2, 1888.)

1. Judgment reversed—The liens of the attorney and court officers, for their fees upon the judgment, are lost by the subsequent reversal of the judgment on appeal. Their position is not so good as the purchaser's at judicial sale under a judgment afterwards reversed.

2. Notice, contents of—In special proceeding to recover judgment upon facts to be shown, particularly if judgment for a penalty is sought, the notice must be as specific as a petition. Notice in this case of a motion to quash a replevin bond is sufficient.

3. Motion to quash bond—A replevin bond having been executed under a judgment afterwards reversed on appeal, a motion to quash the bond was proper.

4. Effect of reversal—When a judgment is reversed on its merits all orders and proceedings between the rendition and reversal are necessarily erroneous.

Appeal from Butler Circuit Court.

Opinion of the court by Presiding Judge Bowden.

Skaggs sued Hines in equity to have a rescission of a contract, whereby Hines had sold him a tract of land. At the May term, 1879, a judgment was rendered rescinding the contract, and ordering a commissioner to ascertain and report payment, rents, improvements, etc. From this judgment an appeal was taken to the Court of Appeals without superseding it. The commissioner's report was made and confirmed at the November term, 1879, and a judgment was then rendered in favor of Skaggs for $285 and costs.

An appeal was taken from this judgment, but the record not having been filed within the prescribed time it was dismissed; an execution was issued on the judgment, and it was replevied

by Hines March 10, 1881. On March 24, 1881, the Court of Appeals reversed the judgment of May, 1879, deciding that the contract of sale had been received by the parties before suit was brought; that the relation of vendor and vendee did not then exist, and that Skaggs had at most no right other than to pay the purchase money and take the land. The lower court was directed specifically to dismiss the petition unless Skaggs tendered in court the purchase money due, in which case Hines was to convey. It does not appear that such tender was made. The order of reference to the commissioner was part of the judgment reversed.

By order of court at the November term, 1879, liens in favor of Skaggs' attorney and the court officers were asserted on the money judgment, which were endorsed on the replevin bond. After the reversal of the judgment of May, 1879, the obligors in that bond gave Skaggs notice, in pursuance of which they moved the court to quash the bond, which was done, and Skaggs now appeals.

He makes these objections to the order:

1st. The lien holders were not notified.

2d. The notice was not sufficiently specific.

3d. The redress sought could not be given on motion.

4th. It could not be given by any proceeding in the lower court.

1st. The rule supporting a title acquired at a judicial sale under a judgment afterwards reversed has no application to this case. It is a rule rejecting title to things sold; it recognizes the right of purchasers to rely on the correctness of the order of sale, and the advantage to all parties in giving confidence to bidders. It operates only when there has been a sale of property under the judgment, and does not apply to a sale of the judgment itself. One who buys it takes it subject to the right of the defendant to have it vacated by any legal means open to him. It goes with all its weakness. A judgment plaintiff can not, as counsel insist, deprive the defendant of his right to vacate an erroneous judgment by selling it. But lienholders are not purchasers. They retain their fee bills yet; they asserted a lien on what might be realized out of the judgment; if it is held to be inoperative, they lose only a supposed

security for a pre-existing debt. They were not entitled to notice. They were not parties to the record. Their position is not so good as that of a purchaser of the subject-matter of litigation pending a suit. "So far as a voluntary purchaser (from one obtaining title by a decree for specific performance) is concerned the litigation is regarded as still continuing notwithstanding the final decree in the court of original jurisdiction, when a writ of error is subsequently prosecuted, or when a bill of review is filed to correct errors apparent on the record; and he is concluded by the decree which is finally rendered and formed merely as the same matter originally in issue," and is not a necessary party (Debell v. Foxworthy, 9 B. Mon., 228; Clark v. Farrow, 10 B. Mon., 446). We do not think the lien holders were entitled to notice. The case must be considered as if there had been no liens asserted.

2d. The notice informed Skaggs that a motion would be made on a day named to quash the replevin bond, which is identified "for the reason that the judgment upon which said bond rests has been reversed and annulled by the Court of Appeals." In special proceedings to recover judgment by reason of facts to be shown, particularly if a judgment for a penalty is sought, the notice must be as specific as a petition; it performs the double function of a petition and a summons; but here the notice is that a motion will be made for a judgment as to the legal effect of a record to which Skaggs was a party. It even stated the fact from which it was supposed that legal effect resulted—it referred Skaggs to the record, which neither could controvert, as the only ground for the motion, and presented merely a question of law arising out of that record. It is difficult to see how it could have been made certain.

3d. If the redress was obtainable by any proceeding it seems that a motion was the proper remedy. When a sale was made and the judgment reversed, and a motion was made to quash the sale, the court considered the matter on its merits (Yocum v. Farman, 14 Bush, 494). Indeed, if it is considered that the reversal of the judgment of May, 1879, did, as the motion assumes, so affect the judgment of November, 1879, as to give the court at its May term, 1881, any control over it, a motion was the peculiarly appropriate means of asserting it,

inasmuch as the latter judgment must in that case be regarded as only a means and instrumentality of judicially executing the former or the reversal, as presenting matter in discharge of the latter. If the bond had been taken under the reversed judgment the propriety of the motion could not be doubted; nor can we see any reason to question it, if that which reversed the former judgment annulled the latter or furnished a legal reason why it should not be carried into execution.

4th. The judgment of the Court of Appeals is conclusive that Skaggs had no just claim for any part of the money awarded by the judgment of November and embraced in the replevin bond. Therefore, the quashing of the bond does him no moral wrong. His cause of complaint, if any, is technical, and goes not to the quality of justice in the order, but to the power of the court to make it. The rule unquestionably is that however erroneous a judgment may be, however rank the injustice it may impose, it is nevertheless as valid, and is to be enforced as fully, as if it awarded exact justice until in some way it is vacated, arrested or discharged. It is equally certain that when a judgment has been reversed and the cause remanded for further proceedings on the issue presented by the pleadings and another judgment is rendered on a new trial, it is valid until it is reversed, however erroneous, and although the court may not have observed the directions of the reversing judgment. In such cases the two judgments are independent; because the first was reversed, it does not follow that the second was wrong. But when a judgment is reversed on the merits, with directions to the lower court to dismiss the petition, and that is done, it is obvious that all orders and proceedings between the rendition of the judgment and its reversal are necessarily erroneous. There is no possible aspect of the case in which they can be right. The record of these proceedings would not on appeal be looked at; referring to the judgment which decided the plaintiff had no right to recover anything and directing his petition to be dismissed, the court would reverse, and the only question it would consider would be the legal effect of its own judgment on these proceedings.

Why, in such a case, may not the circuit court as well decide the same question? Why may it not properly regard those

proceedings merely as in execution of the reversed judgment? Why should it be declared, as a rule of practice, that when the Court of Appeals has in a given case decided that the plaintiff has no cause of action, and has ordered the petition to be dismissed, it is necessary to go again to that court with intermediate proceedings to have them declared invalid, when the record of the circuit court presents the same question, and furnishes the same answer?

The reversal of the May judgment came after the rendition of the November judgment. It decided that Skaggs had no right to recover. It reversed the judgment which asserted that right, and which ordered the commissioner to proceed in carrying it into practical effect. The November judgment of the circuit court was that Skaggs was entitled to recover $285. The judgment of the Court of Appeals, rendered afterwards on the same record, was that Skaggs was not entitled to recover at all. The judgment was inconsistent; both could not be enforced; one asserted a right which the other denied. At the same term at which the mandate of the Court of Appeals was entered, ordering the petition to be dismissed, the court was required to decide whether it would give practical effect to it by quashing the replevin bond, or would permit it to be disregarded.

On the facts of this case the bond was properly quashed.

Judgment affirmed.

B. L. D. Guffy and J. L. Scott for appellant.

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## PADUCAH LUMBER CO. v. LANGSTAFF, ORM & CO.

(Filed June 13, 1883.)

**Civil Code, section 203, subsection 3, is intended primarily to protect the garnishee by notifying him of the particular debt attached in his hand. And although the order of garnishment in this case may have been defective, in not sufficiently identifying the debt, yet if it notified the garnishee to answer, and he did answer, setting out the amount he owed, this answer was a waiver of all objections to the form of the order of garnishement.**

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Reid.

Appellees held a claim on the Paducah Fair and Jockey Club Association for materials furnished it to erect its buildings.

This claim they had sued on, seeking to enforce a mechanic's or material men's lien. Pending the suit a portion of the buildings were burned, and being covered by a policy of insurance in the Home Insurance Co., the loss was adjusted at $700.

On February 1, 1881, appellant sued the Paducah Fair and Jockey Club Association on two uncontroverted demands, amounting to about $1,300. It sued out a general attachment on May 14, 1881, which was endorsed "Execute this attachment on defendant, and by summoning the Home Insurance Co., of New York, to answer as garnishees herein. (Signed) Paducah Lumber Co., by Campbell."

The attachment was received by the sheriff the same day, and his return was as follows: "Executed * * also on the Home Insurance Co., of New York, by delivering to T. J. Ashbrook & Son, the agents of said company, a copy of the within attachment, and summoning them to answer as garnishees, this May 14, 1881."

On June 6, 1881, the insurance company filed its answer as garnishee, admitting an indebtedness of $700 to the Paducah Fair and Jockey Club Co., and alleging the same was due July 30th next thereafter.

On June 10, 1881, a personal judgment was rendered against the fair company, and the attachment sustained. On the next day, on motion of the fair company, the judgment sustaining the attachment was set aside, and an affidavit filed controverting the attachment. On June 12, 1881, appellees presented their petition and were made parties defendants to the action. They claimed, by appropriate allegations, that their lien covered the identical building that was burned, and ought to follow the money received from the insurance company.

On November 3, 1881, appellant's suit was transferred to equity, and consolidated with the action of appellees against the fair company.

On February 20, 1882, in response to an answer and cross petition and an amended answer and cross petition of William Beadles, filed in the consolidated actions, the Home Insurance Co. answered again, admitting their indebtedness of $700 to

the fair company, and expressing their readiness to pay as the court might direct, and alleging the fund had been previously attached by appellant, and that it had answered.

On March 13, 1882, the insurance company was ordered to pay the money into court, which was done March 27, 1882.

On March 16, 1882, the appellees filed their affidavit and took out a general attachment against the fair company. On the order of attachment was this endorsement: "The object of this attachment is to reach and secure in your hands the money due the defendant. the Paducah Fair and Jockey Club Association, from you, the Home Insurance Co., of New York, to wit, $700; and the said company is directed not to dispose of said fund except upon the order of court in this action, this being the money due upon the fire insurance policy from said company to the defendants, Langstaff, Orm & Co.

"By HENRY BURNETT, Attorney."

On this order of attachment the sheriff made the following return: "Executed on the Home Insurance Co., of New York, March 16, 1882, by delivering to their agents, Ashbrook & Son, a copy of the within attachment, and by summoning them to answer as garnishees." * *

On final hearing the court adjudged to appellees priority over appellants as to the $700, and the latter have appealed.

The decision of the court appears to have been based on the idea that appellees were entitled to priority because appellants, in the service of the attachment, did not cause notice to be given to the insurance company, specifying the fund attached or have the object of the attachment endorsed on it, as appellees did.

It seems to us that the purpose of subsection 3 of section 208, Civil Code, in requiring the attachment to be executed upon a debt or demand due the defendant by the delivery to the person owing it a copy of the order, with a notice specifying the debt or demand attached, was primarily to protect the garnishee by identifying the debt, and to notify him it was attached. Although the service of appellant's order of attachment may have been defective, it notified the insurance company that it was required to answer as garnishee, and it did so answer, setting out the amount it owed and when it

would be due. The answer was a waiver of all objections as to defective service by the insurance company. The fair company stood by, saw the answer, and knew the attachment was sustained, and it, too, was estopped to complain of the manner of service. As between the fair company and the garnishee the right of appellants to have the money applied to their debt was complete, and the perfection of this legal right created a lis pendens against all the world; and nearly ten months after the creation of the lis pendens appellees had their attachment levied.

The case of Menderson, &c. v. Specker, &c., 3 Ky. Law Rep., 421, is not in point. There Specker, &c., sued out an attachment on February 17, 1880, directed to the sheriff, but which was executed by a constable. On the next day Menderson, &c., sued out an attachment, which was directed to and executed by a constable, but there was no notice specifying the fund attached delivered to the debtor, nor any indorsement of the object of the attachment or the order. On the 21st of February, 1880, Specker, &c., realizing that an attachment directed to a sheriff could not be executed by a constable, sued out another attachment, which was directed to the sheriff and executed by him on the debtor, as was also a separate notice, specifying in general terms what was desired to be attached. The garnishee, Boyd, did not answer until April 19, 1880, after both attachments had been levied. The status of the rival liens was fixed by the manner of the execution of the processes before the garnishee appeared in the case. There had been no waiver by the garnishee of the manner of service; no creation of a lis pendens by which Menderson, &c., acquired the right to have the money applied to their demand before Specker, &c., intervened by their second, properly levied, attachment. In the case cited the court says, in speaking of the subsection referred to: "This subsection is intended to supply the holder of such property attached, or a debtor owing a debt or demand which is sought to be garnished, with notice of what property, debt, or demand is attached or garnished, and until such notice is served it can not be said that the attachment is legally executed," thus recognizing the purpose of the statute, and only holding that as between attaching creditors, before the party who owes the debt sought to be attached or garnished, has an-

swered, identifying the debt, the party who has had his attachment levied in the way designated by the Code is entitled to priority. The opinion is to be interpreted in the light of the facts on which it is based.

Here the garnishee had answered before the second attachment was levied; had come into open court and disclosed what was owing and when due, and expressed a willingness and readiness to pay the money as the court might order; had waived the defective execution of the attachment; had fully identified the debt as to kind, amount and maturity; and when the answer was filed, as between debtor and garnishee, appellants' right to have the money appropriated to their debt was perfect, and the perfection of this legal right, as we have said, most undoubtedly created a lis pendens against all the world.

The judgment is reversed and cause remanded, with directions to adjudge appellants' priority over appellees as to said $700 paid into court by the Home Insurance Co.

Gilbert & Reed and W. Lindsay for appellants.

Henry Burnett for appellees.

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## HARRIS, &c. v. ZABLE, &c.

(Filed May 16, 1883.)

1. Street improvements—Liability of adjacent owners for—Where the provisions of a city charter relating to the improvement of the city streets requires the city engineer to inspect and approve the work before the owners of adjacent property are liable for such improvements, the engineer's duties are quasi judicial, must be performed by himself in person, and not by deputy.

2. Statutory powers exercised according to the statute—Where a city charter confers upon the corporation power to have the streets improved at the expense of adjacent property owners the power is purely statutory, and every formula prescribed by the statute must be observed before any liability or lien attaches to the adjacent owner.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Richards.

This is a proceeding by a contractor under the city of Louisville to compel the owners of the quarter squares adjacent to Zane street to pay for the improvement of the same. The legislature has conferred upon the corporation, under certain limitations, power to have streets improved at the expense of the

adjacent property owners. This power is purely statutory, and all authorities concur in holding that the statute must be strictly followed in order to create any lien against his property. "All such statutes must be construed most strictly against those asserting claims under them." (City of Henderson v. Lambert, 14 Bush, 30.)

The charter, after fixing what improvements can be made at the expense of the adjacent owners, how the ordinances for the same are to be passed and published, and the manner in which the contracts are to be executed, provides that "when improvements in the public ways have been made, and the contract therefor completed, the city engineer shall, by an insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the city engineer, and such owners, agents and representatives may appear and be heard before such engineer as to whether such improvements have been made in accordance with the ordinance authorizing the same, or the contract therefor" (1 Acts, 1873, page 271). This is an amendment to section 12 of the charter of 1870, the only substantial change being to permit the notice to the property owners to be given by publication, instead of by personal service.

By these provisions it was intended to establish a tribunal before which the persons who were to pay the costs could be heard as to whether the work had been performed in accordance with the contract that had been made at their expense. This is the only stage of the proceedings at which it is provided that they can complain of a defective execution of the work; and if the engineer decides against them and in favor of the contractor, if accepted by the council, his judgment is conclusive unless attacked for fraud or collusion (Murray v. Tucker, 10 Bush, 240). This inspection and reception, then, is one of the most important, to the owner, of all the steps to be taken towards creating the lien upon his land. The legislature does not leave it to the corporation to select the officer who is to be entrusted with the important duty of thus deciding the proprietary rights of the citizen, but designates the city engineer, and requires him to execute a bond, "with good security, to be approved by the general council, for the faithful

and efficient performance of his duties." But in the case at bar the city engineer himself testifies that "said work was inspected and received by my first assistant, J. W. Robinnette, and Street Supervisor Major A. Stein." Was the exercise of the authority thus delegated binding upon the property owners?

Judge Cooley says: "Another and very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out" (Cons. Lim., 204). So it was held, in Hydes & Goose v. Joyes, 4 Bush, 464, that the city council could not delegate to the engineer the power to fix the grade, or determine what materials should be used, or how much of the street should be improved.

Under another provision of the charter of Louisville there is established a "board of commissioners of taxes and assessments," to be composed of designated officers of the city. Among its duties it is required to publish a notice in two or more daily newspapers in the city, for a space of not less than thirty days; that the assessment rolls of all persons assessed for taxation are completed and open for examination and correction. The taxpayers can appear before this board and have any erroneous assessments corrected.

It has been decided in the cases of Ormsby, &c. v. City of Louisville, 79 Ky., 197, and Dumesnil, &c. v. City of Louisville, 4 Ky. Law Rep., 14, that the city could not collect its taxes where the notice had been given by the assessor, instead of by the record; and in the latter case the court ordered: "We think it proper to say that we see no authority conferred upon the assessor, after the assessment rolls are completed and returned by him, to hear or determine applications of aggrieved taxpayers for the corrections of errors made by himself. This is the duty of the board, which is given thirty days for its performance, and in the discharge thereof reasonable opportunities should be afforded the citizen to make his application to the board."

The duties of the board under this provision are analogous to those of the engineer under the section we are considering. In both cases they are quasi judicial, and the person whose property is to be encumbered against his will by the tax is en-

titled to the benefit of the experience, the discretion and the judgment of the tribunal provided by law. If these duties are delegated to any other officials than those to whom the charter entrusts them, no lien can be created upon the property of the taxpayer. "It is a statutory proceeding, affecting the property of the citizen, and by which it may be taken from him; and, therefore, within well-established rules of law the statute must be strictly pursued, and any departure in substance from the formula prescribed by law vitiates the proceedings. The party whose property is to be reached may insist upon the observance of every form prescribed by statute which will in the least tend to his protection." (Marritt v. Village of Portchester, 71 New York, 311.)

The provision under consideration is strictly for the protection of the property owner. He is entitled to be heard before the city engineer. It is his experience, discretion and judgment he is entitled to. It is immaterial whether the assistant engineer and street inspector are men of equal experience, discretion and capacity. They are not appointed by law to decide the questions that may arise between the property owners and the contractors during the inspection of the work, and its reception by them would not be sufficient to create any lien upon the adjacent lots.

The judgment is, therefore, reversed, with direction to dismiss the petition.

Temple Bodley for appellant.

Sam. B. Richardson for appellee.

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## ABSTRACTS OF SUPERIOR COURT DECISIONS.

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### PIATT v. OLIVER.

**Filed May 30, 1883. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.**

**Bill of exceptions—Where the bill of exceptions does not purport to contain all the testimony heard, it is presumed that the evidence before the jury was such as to justify the court in giving and refusing instructions if any competent evidence could have done so.**

**McKee & Finnell for appellant.**

**H. L. Roberts for appellee.**

## ENGLAND v. DEWEESE, &c.

Filed May 30, 1883. Appeal from Grayson Circuit Court. Opinion of the court by Judge Richards, reversing.

Pleading in magistrates' courts—The Civil Code of 1877 repealed the statutes allowing pleadings in magistrates offices to be oral when the amount involved exceeded $50. The petition of appellant should, therefore, have been taken as confessed in the absence of an answer, and his damages assessed.

J. P. Hobson for appellant.

Jas. S. Wortham for appellees.

## RICHARDSON v. MILNER.

Filed May 30, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. A sale of land is not void, although not evidenced by writing, and where, in an action by the vendor for the purchase money, the vendee did not seek to avoid the sale on that ground, but sought to have the lands purchased secured by a good deed, it was proper to consider the case as if the contract of sale had been in writing.

2. Action to enforce vendor's lien—In such a case the vendor should aver that he is able and ready to convey the title he has sold, and should tender a conveyance, which averments are traversible, giving the vendee an opportunity to have the facts laid before the court, so it can determine whether the title shown is good as matter of law, and whether the land to which that title relates is, in point of fact, that which has been sold. It was, therefore, error in this case to submit the cause upon the plaintiff's motion and against the defendant's objection at the moment of tendering the conveyance, thereby precluding the vendee from showing what land, or whose, the vendor was offering to convey.

3. Personal judgment against married woman—It was error to render a personal judgment against the vendee, who was a married woman. The limit of the vendor's right was to enforce his lien and sell enough of the property to pay the debt.

Kincheloe & Eskridge for appellant.

## YOUNG'S ADM'R v. HILDRETH.

Filed May 30, 1883. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Authority to sign name of surety must be in writing—Pleading—Under the statute which provides that "no person shall be bound by the act of an agent unless the authority of the agent is in writing, signed by the principal," the answer must show that the person attempted to be charged was a stranger to the consideration in order to raise the question whether he is bound by the signing of another having only oral authority. Therefore, a simple plea of non est factum will not raise that question.

W. P Ross for appellant.

Reid & Stone for appellee.

## ADKINSON, SURVIVING PARTNER v. DENT.

Filed May 30, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Reid, affirming.

Partners are not entitled to interest on capital furnished by them to carry on a venture in which they are all interested. Interest is only allowed as against a partner having the funds of the partnership in his hands after the dissolution, when he knows he is indebted to his copartner and refuses to pay.

2. Testimony as to transaction with decedent—A person can testify for himself concerning a transaction with a decedent when the representative of the decedent has testified with reference thereto.

Kincheloe & Eskridge for appellant.

Alfred Allen and G. W. Williams for appellee.

## MARKLEY BROS. v. PETER'S ASS'EE, &c.

Filed May 30, 1883. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Reid, affirming.

New trial—Newly-discovered evidence—A new trial should not be granted upon the sole ground of the discovery after verdict of parol testimony concerning a point litigated or fact known, or that could have been known by the exercise of ordinary diligence.

A. R. Clarke for appellants.

C. H. Lee for appellees.

## BOYD, &c. v. SMOOT.

Filed May 30, 1883. Appeal from Bath Circuit Court. Opinion of the court by Judge Reid, reversing.

1. Jury trial—The Code does not compel the trial judge to try issues of fact when a jury is not demanded by the party. He may do so or he may order a jury.

2. Pleading fraud—An answer to an action on a note alleging generally that the note or its execution was procured by fraud and misrepresentation, without averring the facts constituting the fraud and misrepresentation, is sufficient and must be taken as true unless denied, though the rule seems to be otherwise where an award or settlement is assailed for fraud or mistake or misrepresentations.

3. Plea of usury—An answer alleging that the whole note sued on is usury is too general and indefinite. It should allege facts showing that the debt embraces usury.

R. Gudgell & Son for appellants.

Reid & Patterson for appellee.

## OLVIN v. STINNETT.

Filed May 30, 1883. Appeal from Washington Circuit Court. Opinion of the court by Judge Richards, reversing.

1. Action for conversion of note—Damages—Where a defendant has converted to his own use a promissory note belonging to the plaintiff, his liability is not upon the covenants of the note, but for damages for its conversion.

2. In estimating damages for such conversion it would be proper to embrace the interest on the note, but it would be error to make the judgment bear a greater rate of interest than six per cent.

3. A party can not sue for a specified sum for the conversion of one note,

and recover a still larger sum for the conversion of another that has been taken in renewal of the first. He should be limited to the amount of the one sued for.

W. E. Russell and W. E. Selecman for appellant.

John W. Lewis for appellee.

EDELEN & THOMPSON v. NEWMAN.

Filed May 30, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Richards, affirming.

Contract against public policy—A railroad company had the contract for carrying the mail over its line, and it became necessary for it to employ a subcontractor to carry it from a depot to the terminal office in a town; two livery stable keepers of the town entered into a combination that had for its object, first, to prevent competition between themselves in bidding for such subcontract; and, second, to put it out of the power of the hotel keepers of the town to compete with them.

Held—That such agreement is void, because against public policy, and that the penalty it provides for its violation can not be recovered.

Muir & Wickliffe for appellants.

John S. Kelly for appellee.

NOLAN, WILMORE & CO. v. JACKSON.

Filed May 30, 1883. Appeal from Jessamine Circuit Court. Opinion of the court by Judge Richards, granting rehearing and reversing.

1. Injunction to restrain collection of tax—The statute allowing a taxpayer to first apply to the county court and then to the circuit court to have a correction of a tax improperly charged to him, provides no adequate remedy for one whose property has been levied on and is about to be sold for taxes he does not owe. Equity, by its writ of injunction, can alone afford complete protection.

2. Equity jurisdiction—The jurisdiction of equity in cases like this has been acknowledged and exercised both in England and this country ever since taxes have been provided for by legislative enactment.

If courts of law, by their own encroachments or by legislative enactments, assume jurisdiction of matters formerly cognizable in equity alone, it will not necessarily result in depriving the chancellor of his jurisdiction. When the jurisdiction of equity has once been established over any subject it can only be deprived of it by positive legislative enactment.

J. S. Bronaugh and Ben P. Campbell for appellants.

Breckinridge & Shelby for appellee.

BROWN v. CARPENTER'S EX'OR.

Filed May 23, 1883. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Evidence necessary to sustain grounds for attachment—Where the ground for an attachment is that the debtor is about to sell and convey his property with the fraudulent intent to cheat, hinder and delay his creditors, and the debtor has neither done nor attempted to do any act suggesting a fraudulent purpose, his mere fragmentary declarations that he is "about to" do such act should not be regarded sufficient to sustain the attachment if they can be fairly interpreted as consistent with his rights and duties as a debtor.

Hill & Alcorn for appellant.

Durham & Jacobs for appellee.

## GROGAN & KENNY v. ALLEN, &c.

Filed May 23, 1883. Appeal from Bath Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Conclusiveness of judgment—The fact that a judgment which was made the consideration for a note was erroneous is no defense to an action on the note, the judgment being no more open to question than it would be in an action to recover money paid in satisfaction of it.

Reid & Stone for appellants.

J. J. Nesbitt and R. Gudgell & Son for appellees.

## NEALE v. SHEETS, &c.

Filed May 23, 1883. Appeal from Henry Circuit Court. Opinion of the court by Judge Reid, affirming.

1. Forcible entry and detainer—Traverse—When a traverse of the inquisition upon a writ of forcible entry or detainer is carried to the circuit court it stands on the docket to be tried anew. A jury trial is not required until issue is joined on the traverse. Before this is done the court can render judgment by default or pass upon any question of law as in other cases.

2. The traverse is the foundation of the jurisdiction of the circuit court to retry the truth of the inquisition held before the justice, and unless filed before the justice within three days after the inquisition the circuit court should dismiss the action.

3. When the traverser executes before the justice of the peace the bond required by statute, its recitals may be presumptive evidence of the filing of a traverse with the justice as against the traversee, in the absence of countervailing evidence, but no bond having been executed in this case no such presumption can be indulged.

Geo. C. Drane for appellant.

Ben S. Robbins for appellees.

## FORREST'S EX'ORS v. CITY OF COVINGTON.

Filed May 23, 1883. Appeal from Kenton Chancery Court. Opinion of the court by Judge Reid, affirming.

1. Recovery of taxes illegally collected—Limitation—Under an amendment to the charter of the city of Covington, which provides that "all actions to recover taxes or assessments which have been or may be illegally or erroneously collected, shall be prosecuted within six months after the cause of action arose, and not afterwards," no action can be brought after the expiration of six months from the time of payment, no matter when the discovery was made that the taxes were illegally collected.

2. The operation of the statute is not limited to cases where the property was within the taxing power, and where there has been irregularity in the levy, assessment or collection, but extends to every case where the citizen has paid taxes which the city had no right to exact.

Cleary, Hamilton & Cleary for appellants.

T. F. Hallam and M. L. Roberts for appellee.

## SNOWDEN v. LEIGHT.

Filed May 23, 1883. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Richards, reversing.

1. Landlord and tenant—When a landlord sues upon a written lease he must allege the conditions precedent in consideration of which the tenant covenanted to pay the rent.

2. Consideration for contract of guarantor—Where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to the contract of the surety or guarantor.

3. Release of guarantor—When a third party has guaranteed the payment of rent the landlord does not release him by merely neglecting to sue out an attachment for rent not due, although such landlord knows the tenant is disposing of the property on which the lien exists.

N. T. Crutchfield for appellant.

WAUGH v. HOPKINS, &c.

Filed May 23, 1883. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Richards, affirming.

Vendor's lien—Estoppel—Where a former vendor of real estate represents that there is no lien upon the property, though he in fact holds a note for part of his unpaid purchase money, thereby inducing an innocent third party to buy the land and pay for the same, such vendor can not thereafter enforce his lien against the property in the hands of such third party.

W. H. Cord for appellant.

W. P. Ross for appellees.

ADAMS EXPRESS CO. v. BLEICH.

Filed May 23, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Richards, affirming.

1. Instructions—Bill of exceptions—Instructions that are not made a part of the record by an order of court or bill of exceptions can not be considered on appeal.

2. When a transcript does not show that it contains all the evidence, the presumption is that the testimony was sufficient to support the verdict.

3. Action by consignor against common carrier—A consignor may maintain an action in his own name against a common carrier where he negatives in his pleading the presumption that goods delivered to the carrier belong to the consignee.

M. A. & D. A. Sachs and Bigger & Reid for appellant.

NALL v. THE FARMERS BANK, &c.

Filed May 23, 1883. Appeal from Webster Circuit Court. Opinion of the court by Judge Richards, reversing.

1. Usury—Although a debt may be paid by the execution of a new obligation by different parties, such payment will not authorize the application of the statute of limitation, but so long as the usury can be traced it may be extracted, even though a new obligation has been executed by different obligors.

2. If the note into which the usury was carried has not been paid over one year, an action can be maintained to recover such usury.

3. Forfeiture of interest—The statute providing for the forfeiture of all interest, where a greater rate is charged than that provided by law, having been repealed, the penalty therein provided can not now be recovered, but in such cases the debtor can recover only what he has paid in excess of six per cent.

Cook & Towery for appellant.

W. C. Given for appellees.

THE

# KENTUCKY LAW REPORTER AND JOURNAL

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## NOTES OF CASES.

Owing to the illness of the editor, Mr. Brannin, "notes of cases" will have to be omitted in this issue.

## KENTUCKY SUPERIOR COURT.

### CHAMBERS v. NORTHERN BANK OF KENTUCKY.

(Filed May 16, 1883.)

1. Liability of bankers—Rights of checkholders—Where either natural or artificial persons hold themselves out as bankers, by merely accepting a deposit, without any express agreement, the usages of trade imply a contract to pay, in the order of their presentment, the checks of the depositor drawn upon the fund so long as it remains unincumbered; but the checkholder's right to the fund is not perfected by the mere delivery of the check to him; he must first demand payment of the bank.

2. If, between the delivery of the check and the demand for payment, nothing has occurred to justify the bank in refusing to honor the check, the demand fixes the liability of the bank to the holder, and if payment is refused he can prosecute an action against the bank for the recovery of the amount.

3. Bankruptcy of depositor—The filing of a petition in bankruptcy by the depositor is not a revocation of a check previously delivered by him, and the fact that the bank has had notice of the filing of the petition is no excuse for refusing payment of the check when demanded.

4. Title of assignee—The assignee in bankruptcy takes the property of the bankrupt subject to all legal and equitable claims of others.

5. Effect of fraudulent preference—A preference given by an insolvent to one of his creditors does not of itself have the effect of an assignment for

ment. It is not alleged that the money had been paid to the assignee, or that the assignee had demanded payment, but simply that before the check was presented the bank had notice that the drawers had filed their petition in bankruptcy.

Justice Story says assignees under bankrupt laws "are deemed to possess the same equities only as the debtor himself would possess." (Eq. Jur., section 1, page 228.) "The assignee takes the property of the bankrupt subject to all legal and equitable claims of others," and "he is affected by all the equities that can be urged against the bankrupt." (Bump on Bankr., 10th edition, page 500.) "The estate taken by the assignee is precisely that of the bankrupt." (Lazeas v. Porter, 7 Rep., 216.)

These authorities are all quoted and approved by the Court of Appeals of Kentucky. (Exchange and Deposit Bank v. Stone, 3 Ky. Law Rep., 603.) It can not be said that the assignment in bankruptcy would have any greater effect than the drawing of a subsequent check. If such subsequent check had been drawn, but not presented, a knowledge of its existence would not have excused the bank in refusing to pay plaintiff. Nor is the assignment in bankruptcy any defense. The assignee takes only the debtor's rights. Filing the petition in bankruptcy was no revocation of the check previousy delivered to the appellant.

A preference given by an insolvent to one of his creditors does not, of itself, have the effect of an assignment for the benefit of all. This effect can only be given it by a decree in chancery, and if an action is not brought for this purpose within six months after the act complained of, it becomes valid against the world. So the fact that a preference has been made is no defense for parties sued on contracts with the debtor. He may make a preference to-day, and all his contracts before the bringing of the action may be valid, or circumstances may transpire between the act of preference and the commencement of the action that would make it improper to enter a decree declaring it an assignment for the benefit of the creditors. Such would manifestly be the case where the debtor has, in the meantime, made an assignment in bankruptcy. No receiver could be appointed, or distribution made under the State statute, without interfering with the rights of the assignee in bankruptcy, and infringing upon the jurisdiction of the Federal Courts.

In the case at bar defendant, having admitted the bankruptcy, could not plead the State statute against preferences. If the bank had wished to be protected against the possible annoyance of a suit by the assignee in bankruptcy it could have made him a party and required him to interplead with the plaintiff. But he is not a necessary party in an action to establish the rights of the check holder. The allegations of the answer do not state facts sufficient to show that the assignee could set aside the transaction under sections 5128-9 of the bankrupt act. (Edwards v. Tandy, 78 Ky., 168.)

Since the answer presented no defense the judgment is reversed, with directions to enter a judgment in plaintiff's favor for the amount sued for.

Stevenson, O'Hara & Bryan for appellant.

Pryor & Chambers for appellee.

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## NEALE v. SHEETS, &c.

(Filed May 23, 1883.)

1. Forcible entry and detainer—Traverse—When a traverse of the inquisition upon a writ of forcible entry and detainer is carried to the circuit court it stands on the docket to be tried anew. A jury trial is not required until issue is joined on the traverse. Before this is done the court can render judgment by default or pass upon any question of law as in other cases.

2. The traverse is the foundation of the jurisdiction of the circuit court to retry the truth of the question held before the justice, and unless filed before the justice within three days after the inquisition the circuit court should dismiss the action.

3. When the traverser executes before the justice of the peace the bond required by statute its recitals may be presumptive evidence of the filing of a traverse with the justice, as against the traversee, in the absence of contradicting evidence, but no bond having been executed in this case, no such presumption can be indulged.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Reid.

Upon a trial in the country appellant, who was defendant in a writ of forcible detainer, was found guilty and a judgment of restitution rendered. Filing no traverse with the justice, he took the case to the Henry Circuit Court, where it was, at April term, 1881, dismissed with judgment for the costs of the

traversees. Neale filed his affidavit, and that of the deputy sheriff, April 22, 1881, and asked to set aside the judgment and have a new trial, which motion was overruled at a subsequent term, October 14, 1881. On 17th of October, 1881, the court entered judgment against Neale for the costs of the traversees in the circuit and justice's courts, and for restitution; and appellant has appealed.

Section 465, New Code, provides: "The clerk shall docket the traverse as other actions; it shall stand for trial as docketed; the traversee shall join issue on the traverse; and it shall be tried by a jury and judgment given on the verdict as in other cases: Provided, however, That nothing herein contained shall be construed to prevent the court from giving judgment against either party by default, nor from deciding any question of law as in other cases." But for the proviso in this section—which section corresponds with section 513, Old Code—it has been held that a jury trial would have been imperative, even when the tenant made default. (Dibble v. Porter, 1 Duvall, 190.) And the same case also decides that where the traversor fails, on the calling of the cause for trial, to appear, either by himsef or counsel, the court may render judgment in favor of the traversee, although the latter may not have joined issue on the traverse. When the traverse is carried to the circuit court it stands on the docket to be tried anew. A jury trial is not required until issue is joined on the traverse. Before this is done the court can render judgment by default, or pass upon any question of law, as in other cases. The proceeding is an action, or cause of action, whenever it is docketed, and it does not require an actual traverse to constitute it a "cause." It does not appear for what reason the cause was dismissed, or what question of law controlled the action of the court. The court had the power, under subsection 1, section 371, Civil Code, to dismiss the action on the failure of the traversor to appear at the trial, or because no traverse was filed before the justice within three days after the inquisition. Under section 463 a traverse is not allowed to be filed after three days from the inquisition, and unless so filed the justice is bound to enforce his judgment. This traverse is the foundation of the jurisdiction of the circuit court to retry the truth of the inquisition held before the justice. The same section

also requires the traversor to gave a bond, with sufficient security to be approved by the justice, for the payment of costs and damages—which was not done in this case. A paper purporting to be a bond, and sworn to before A. R. Adams, J. P. H. C., appears in the record as filed by appellant in the clerk's office of the Henry Circuit Court, and not as given before the justice who tried the case, or approved by him. If the statutory bond had been executed its recitals might have perhaps been presumptive evidence of the filing of a traverse with the justice, as against the traversees, in the absence of countervailing evidence (4 Bush, 553); but no such bond having been given as required by the statute, no such presumption can be indulged in. There was no sufficient cause manifested for setting aside the judgment and granting a new trial.

The judgment of October 12, 1881, of restitution, did not prejudice appellant, except as to the mere costs attending the judgment, as he had filed no traverse of the judgment before the justice.

Whereupon the judgment is affirmed.

Geo. C. Drane for appellant.

Ren. S. Robbins for appelee.

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## YOUNG'S ADM'R v. HILDRETH.

(Filed May 30, 1883.)

**Sureties—Authority of agent—Pleading—Under the statute which provides that "no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal," a good answer must show that the defendant was a stranger to the consideration, in order to raise the question whether he is bound by the signing of another having only oral authority. He can not avail himself of the statute under the general plea of non est factum.**

Appeal from Nicholas Circuit Court.

Opinion of the court by Presiding Judge Bowden.

Hildreth sued the appellant, as administrator of Mary G. Young, on a note signed "B. R. Young, Mary G. Young." The answer, after pleading want of capacity in the intestate to make a contract, adds: "He says that the note sued upon is not her act and deed." It seems that, there being but one

paragraph, the pleader intended to present the defense that the note was not her act because she had no capacity to do such act. In an amended answer, more fully restating the matter of incapacity, the appellant says that "she did not sign said note, or authorize it to be signed; or deliver or authorize it to be delivered; nor did she ratify or confirm it."

The principal question presented by the appeal is whether, under this issue, the appellant could avail himself of the defense provided by section 20, chapter 22, General Statutes, which declares that "no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal; or, if the principal do not write his name, then by his sign or mark, made in the presence of at least one credible attesting witness."

A plea of non est factum involves the defendant's relation to the instrument, but not the consideration on which it rests. Under that plea he could not avail himself of the defense that there was no consideration, or that it was illegal. Testimony respecting the consideration would be admissible only as it might tend to show that the defendant was not a party to the instrument itself. If admitted for that purpose, and if sufficient to maintain a defense of no consideration, it would not avail for the latter in the absence of a proper plea to raise the issue.

The statute was not intended to enlarge the operation of a plea of non est factum. It presents a defense that involves and depends upon the fact that the defendant is a stranger to the consideration. If he did not sign his name, or authorize it in writing to be signed, it may, nevertheless, be his act. If he was a principal in the note, being a party to the consideration, he would be bound by a signing done by his verbal authority. It is only when he is a stranger to that consideration that a written authority is required. Therefore a good answer, under the statute, must show that he was a stranger to the consideration in order to raise the question whether he is bound by the signing of another having only oral authority.

The question on a plea of non est factum, when the name is signed by an agent, is—"Did the agent have any authority?" To maintain her issue the plaintiff could show that there was oral authority; that the defendant had admitted he had

given such authority; that he had recognized his liability; that he had promised to pay the debt as her debt; and whatever else tends to show that the signing was not a forgery, but an authorized and innocent act.

Under the statute, when it appears that the defendant was not a party to the consideration, the only question is, "Did the agent have written authority?"

The plea of non est factum is that there was no authority to do the particular act of signing. If the plaintiff shows there was an authority to do that act her allegation is maintained. The issue presented is whether the agent was authorized to sign his name to that paper, not whether that authority was invalid by reason of the undisclosed and particular relation of the defendant to the consideration of the note; that is an entirely different question.

Whether a defendant is a party to the consideration is a question of fact. A defense, under the statute, exists only when he is a stranger to it, and, therefore, there being no defense under it unless the defendant is a stranger to the consideration, an answer, in order to present that defense, must aver that essential fact. The note sued on purports to be that of joint obligors, and the presumption is that both were bound as principals. If the answer had, in terms, conceded that the fact was as it is thus presumed to be, the defense, under the statute, would have been precluded by that concession. But it does not dispute that presumption; it allows it to stand as an unchallenged fact, to operate through every stage of the case according to its proper force, relying on evidence to perform the functions of pleading.

It would practically work injustice to permit a defendant who has given oral authority to avail himself of the statute under a general plea of non est factum. If the note shows his name was signed as surety, or if the pleadings allege that he was in no way a party to the consideration, and that he did not sign, or authorize the signing, the plaintiff has notice that the defendant is not bound unless he gave written authority, or signed his own name, and may then well be required to come prepared to show the writing, or to prove that one was given. But if the note does not show, and the pleadings do

not allege, that the defendant is a stranger to the consideration, and the defendant tenders no issue except that he did not sign the paper, or give any authority to any one else to do so, the plaintiff may come prepared with undoubtable evidence that he did authorize the act, and yet neglect to come prepared to show that, in point of fact, the authority was in writing. Not being notified of the claim of the defendant that he was not a party to the consideration, he may not come prepared to show that, in point of fact, he was a party to it.

This rule imposes no hardship on a defendant in any case. If he gave no authority, written or oral, he may escape injustice by a common plea of non est factum. On that issue the plaintiff must prove that he signed the paper, or authorized it to be signed. If, before the statute, the plaintiff had, in a given case, made this appear by successful perjury, there would have been no remedy. That a verdict may be procured by lies, so well delivered as to elude detection, is an evil that neither genius in legislation nor watchfulness in courts can always prevent. But under the statute the defendant has a better chance to escape wrong. If he is a stranger to the consideration he can allege that fact. If it is denied he can go at large into that question, and when it appears that he is a stranger, and, therefore, could not be bound otherwise than as a surety, he may rest his defense and demand the writing, if he did not sign his own name.

The plantiff, who was a son of Mary G. Young, having testified, the appellee was properly allowed to testify respecting the same matter. The assignment that a new trial was refused is too general. The judgment conformed to the verdict, and was sustained by the pleadings, and was, therefore, properly rendered.

The judgment is affirmed.

W. P. Ross for appellant.

Reid & Stone for appellee.

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## LEAVISON v. ROSENTHAL.

(Filed June 6, 1883.)

**1. Capias ad satisfaciendum—Power of court over its orders—Where the court has failed to note at the foot of a judgment that a capias ad satis-**

**faciendum may issue thereon, it has no power to award the writ at a subsequent term of the court. In awarding the writ the court acts judicially, and when a final judgment has been rendered, and the case is no longer on the docket, the court can not hear and determine a question of law depending for its proper solution on the facts alleged in the pleadings.**

**2. A fieri facias and a capias ad satisfaciendum can issue at the same time against the goods and person, but can not be contemporaneously executed; therefore, the mere fact that a fi. fa. has been issued, and is at the time in the hands of the sheriff, does not preclude the right to have a ca. sa. issued, but it seems that it would be otherwise where there has been a levy under the fi. fa.**

**3. It was error to award a capias pro fine upon a judgment recovered by an individual.**

Appeal from McCracken Circuit Court.

Opinion of the court by Presiding Judge Bowden.

In an action for slander Rosenthal got a judgment, September 24, 1881, against Leavison. On affidavit an execution of fieri facias was issued the same day. At the same term, October 8, he moved the "court for a capias on the judgment," and the court, November 3, ordered that the judgment "be so amended as to award capias pro fine" for the amount adjudged. At the next term of the court, on notice given, he moved for a capias ad satisfaciendum, which was awarded March 22, 1882.

This appeal seeks to reverse the order of November 3, 1881, awarding a capias pro fine, and the order of March 22, 1882, awarding a capias ad satisfaciendum.

That the first order was erroneous seems to have been conceded by the application for the second. A capias pro fine was not at common law, and is not under our statute, a process for enforcing judgments recovered by individuals. The conditions of confinement under this writ are different from those under a ca. sa., and its substitution for a writ of ca. sa. might result in substantal injury to the defendant; if, indeed, its form would allow it to be so substituted.

By the common law the various remedies to enforce the collection of judgments were regarded as cumulative. A fieri facias and a capias ad satisfaciendum could issue at the same time against the goods and person, but both could not be contemporaneously executed. (Freeman on Executions, section 13, 454.) It seems, therefore, that the mere fact that a fi. fa. had been issued, and was at the time in the hands of the

sheriff, if such was the case, did not preclude the right to have the ca. sa. issued. If there had been anything done under the fi. fa. it might have been otherwise; and it seems that the ca. sa. should have been refused if, at the time, there had been a levy under the fi. fa.; certainly if there had been a sufficient one.

The statute which provides "that the court shall note at the foot of the judgment that a capias ad satisfaciendum may issue thereon," does not require the plaintiff, as a condition of having this writ awarded, to forego his right to have a fieri facias, which may be issued on any judgment for money. It is not an alternative writ, the issuing of which presupposes the abandonment of the ordinary process for enforcing money judgments.

It can not, however, be issued without an order of court allowing it. In what cases it may be a legal process is a judicial question. In Blair v. Russell, 14 Bush, 412, it was decided that where the order awarding the writ was not noted at the foot of the judgment the refusal of the court, at the same term, on motion, to supply the omission was erroneous. The judgment was such as entitled the plaintiff to the writ, the court had still control of its orders, and it is difficult to see why it should not have exercised an undoubted power to give effect to an unquestioned right.

In this case the motion was not made at the term at which the judgment was rendered, but at a subsequent term. If the failure of the court to note at the foot of the judgment, when it was rendered, that the writ might issue was an error of the court, as seems to be intimated in Blair v. Russell, we see no reason why it should be exempted from the operation of the general rule which limits the control of a court over its orders to the term at which they are made. If it is considered that the note "at the foot of the judgment" is to be made as part of the judgment, the case presented is one in which a final judgment was rendered giving less relief than the party was entitled to have, which the court might give during the term, but not afterwards. If it is consided that the order awarding the writ is not part of the judgment, but separable from it, it seems that, in analogy to the rule referred to, a waiver of that special means of enforcing the judgment should be conclusively inferred from a failure to apply for it at the

term at which the judgment itself was rendered. It is doubtless only in exceptional cases, in which the common writ of fieri facias will not afford a complete relief; if an extroardinary process is not asked for it does not seem unreasonable to assume that it was not wanted; and it tends to convenince in practice to require the party to decide the matter definitely while the court has control of all its doings. In awarding the writ the court acts judicially; it must dedcide as matter of law that which requires an examination of the pleadings to ascertain if the judgment was such as entitled the plaintiff to the writ. It seems to us it would contravene the spirit as well as the form of the rule referred to if it were held that when a final judgment has been rendered, and the case is no longer on the docket, a court may, at a subsequent term, hear and determine a question of law depending for its proper solution on the facts alleged in the pleadings. It is our conclusion that the orders of November 3, 1881, and of March 22, 1882, were erroneous, and should be set aside.

The amount of the judgment is not sufficient to give this court jurisdiction, if the appeal was intended to bring that matter up.

The orders referred to are reversed.

Gilbert & Reed and W. Lindsay for appellant.

Rhey Boyd and Cyrus Harris for appellees.

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## BOONE COUNTY v. DILLS.

(Filed June 13, 1883.)

**Order of allowance by county court—Jurisdiction of Superior Court—An order of allowance by a county court has the binding effect of a judgment against the county, and the county can not maintain an action to recover money paid under such an order. The appellant's right to maintain such an action depends, therefore, upon the validity of a special statute authorizing it to sue, and for that reason the appeal is remanded to the Court of Appeals.**

Appeal from Boone Circuit Court.

Opinion of the court by Presiding Judge Bowden.

This was an action to recover from appellee money allowed him by the Boone County Court at its levy terms during several years, on claims for fees preferred by him as clerk of the

county court, for which the county was not liable. The action was directed by the county court to be brought, and it was also authorized by an act of the Legislature approved after all the money had been paid. All of the claims were presented and allowed after the General Statutes went into effect. By the act of March 7, 1867, an appeal lay to the circuit court from an order of the levy court making, or refusing to make, an allowance, but by section 11, chapter 27, General Statutes, the appeal lies only when the court refuses to allow. Even if the county could have appealed from an order of allowance under the act of 1867, which it seems it could not have done without the consenting order of the county court, it is clear it could not appeal from such orders made under the General Statutes.

In Prebles v. Chism, 5 Mon., 158, it was decided that there is "no power possessed by the county courts, after they have laid their levy, to review or reverse their former allowances in favor of the claimants. If claims presented are allowed the entry of allowance is conclusive against the county, and although the allowance is not a judgment, yet it is to operate with the same binding effect." This case decides that the order of allowance, though not a judgment, has the same conclusive force. If the order is not set aside by appeal, or otherwise than by the act of the county court itself at a subsequent term, the money must be paid; that is the fair deduction. It is difficult to see how a county can sue to recover that which it has no legal power to refuse to pay.

Dills presented his account as a debt due to him from the county. The order of allowance did not purport to be a donation, but to be, as in all like cases, a provision for paying a county debt. On the presentation of every demand the preliminary question arises whether the county is liable for it, and every order is based upon either the assumption or decision that the liability exists. It is necessarily within the province of the court to decide this question. Therefore the order is not void. Even if it were granted that the county was not legally liable for any part of the demand the order can not be treated as if it were on its face a mere gift. The county court has no power to make donations, but it has power to decide as to the existence of a legal liability, and to

allow a claim when that liability is found to exist. It may possibly happen to a county court, as it sometimes does to other courts, that it affirms a liability where none exists, either in law or in fact; but it does not follow that the county may maintain an action to recover money once decided by the county court to be due, and which has been paid under its order, which has the binding effect of a judgment, any more than an individual may sue to recover back what has been paid under an erroneous judgment. It can not be said the county court is not clothed with complete power to inquire into the matter of the county's liability, or any demand asserted against it; and, therefore, the order can not be treated as the court may treat a judgment without jurisdiction. It may be that "jurisdiction" is not exactly the word to use when speaking of the power of the county court to conclude the county by its orders, differing, perhaps, from the correct word as a judgment differs from an order of allowance—not the same, but having the same effect.

In Garrard County v. McKee, 11 Bush, 239, the order of the county court, refusing to allow the claim sued on, was pleaded in bar; the plea was held bad on the ground that the act of 1867 did not apply to that claim, and that, therefore, McKee was not bound to appeal. In Washington County v. Thompson, 13 Bush, 242, the county court had, by order, refused to allow a claim similar to McKee's, and he appealed; it was held that under the act of 1867 he had the right to appeal. The effect of both decisions, expressly declared in the latter, is that, the remedy by appeal being merely cumulative, county creditors may either appeal or resort to their actions.

While an order refusing to allow has not the binding effect of a judgment against the claimant, an order making the allowance has that effect against the county.

We have considered the matter merely with regard to the jurisdiction of this court. If we had concluded the action was maintainable independent of the special statute of 1882 we would have jurisdiction, as the validity of that statute would not have been involved. But being of opinion that it can be maintained only by force of that statute, if at all, we do not think this court has jurisdiction.

Therefore the appeal is remanded to the Court of Appeals.

R. C. Green and F. Riddell for appellants.

O'Hara & Bryan for appellees.

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## EISFELDER v. KLEIN, &c.

(Filed June 26, 1883.)

1. Slander—Proof of slanderous words—In an action for slander the words must be proved substantially as laid; it is not enough to prove words of the same import; the words must be substantially the same words, and it is not sufficient that they contain substantially the same charge.

2. This rule relates to the slanderous words alone, and has no reference to the words used merely to designate the person of whom the slander is uttered.

3. While the proof of the speaking is for the jury, the correspondence between the words spoken and the words laid is for the court.

4. In such actions it is error to instruct the jury that they can take into consideration the costs of the suit.

5. Contradictory instructions condemned—An error in an instruction is not cured by a contradictory instruction. Contradictory instructions are apt to confuse, and should not be given.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Richards.

This is an appeal from a judgment for damages recovered in an action for slander. The petition alleged that the words were spoken of, and concerning, the female appellee. This was put in issue by the answer.

"The rule is that the words must be proved substantially as they are laid; it is not enough to prove words of the same effect or import, or conveying the same idea; the words must be substantially the same words, and it is not sufficient that they contain substantially the same charge, but in different phraseology. Equivalent words of slander will not do. * * * While the proof of speaking is for the jury, the correspondence between the words spoken and the words laid is for the court." (Taylor v. Moran, 4 Met., 138.) But this rule relates to the slanderous words alone, and has no reference to the words which are used merely to designate the person of whom the slander is uttered. In the case at bar there was no dispute about the slanderous words themselves, the defendant admitting in his testimony that he had spoken them; the

conflict in the testimony was concerning the words used to point out the person meant. It was only important, therefore, to ascertain whether the defendant used the words "stuifun halts" or the words "krummen halts" in determining whether the slander was spoken of, and concerning, the plaintiff. In so far, therefore, as the first instruction left it to the jury to find whether the words laid "or words in substance the same" were spoken it was misleading, and should not have been given.

But the first instruction is also erroneous in that it permitted the jury, in assessing the damages, to consider "the costs and trouble of the suit." It does not say what suit; but counsel for appellees assume it refers to this action. The taxed costs always follow the judgment. Therefore, if the jury have included them in their verdict, the appellees now have judgment for double the amount they were entitled to on this account. As to the extroardinary costs, which would be embraced by the instruction, the court also erred; for even if they were of such character as could have been recovered in this action it is sufficient to say they were neither alleged nor proven.

There can never be any recovery in an action of slander unless the words complained of were spoken of, and concerning, the plaintiff. As the third instruction isolates this universally recognized principle it should not have been given. And this error is not cured by the court, in a subsequent instruction, telling the jury they could not find against the defendant unless they believed the words were spoken of, and concerning, the female plaintiff. "Contradictory instructions, without any indication which is to be preferred, are worse than no instructions, being rather calculated to distract and perplex the jury than to enlighten their minds upon the law of the case." (Clay v. Miller, 3 Mon., 148; Tate v. Parish, 7 Mon., 327; Gaines v. Buford, 1 Dana, 502.)

While it would have been proper, after having established that the words were spoken of, and concerning, the plaintiff, to prove that they had been generally circulated, still the wife could not testify what her husband told her he had heard. Nor should the witness Miner have been permitted to describe the scene between the appellant and his wife, supposed to

have occurred in the engine room of the brewery. It was in no way connected with the slander alleged, or its results. While the tesimony in regard to other ladies visiting the brewery was irrelevant, we can not see that appellant could have been prejudiced thereby.

But for the reasons above given the judgment is reversed and the case remanded for a new trial.

J. F. Clay and M. Yeaman for appellant.

John Young Brown, John W. Lockett and Wm. Lindsay for appellees.

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## HALL v. FORMAN, &c.

(F led June 13, 1883.)

**1. Action on attachment bond—Action for maliciously suing out attachment—The recovery of such general damages as injury to credit, feelings and reputation, in an action for suing out an attachment maliciously and without probable cause, is not a bar to an action on the attachment bond for such special damages as are covered by it.**

**2. Res adjudicata—Estoppel—The fact that the plaintiff could have sued for the special damages in the first action does not estop him from seeking to recover them by an action on the bond; it was a mere privilege of which he could avail himself at his discretion.**

**3. The two actions differ widely, first, as to their form; second, as to the parties; third, as to the proof necessary to establish each; and, fourth, as to the extent of the recovery; nor can they be joined in the same petition, as one is ex contractu and the other ex delicto.**

Appeal from Clark Circuit Court.

Opinion of the court by Judge Richards.

The appellant sued the appellees upon an attachment bond, for the damages sustained by the wrongful suing out and levy of an attachment. The defendants answered that the plaintiff had already recovered damages against the principal on the bond, for suing out said atachment maliciously and without probable cause. The plaintiff replied that in the action for malicious prosecution he had only sued for "such damages as he sustained on account of loss of credit, injury to his reputation for honesty and integrity, and pain and injury to his feelings and sensibilities," and that he had "neither sued for nor recovered" the special damages for which this action was

prosecuted. This reply was adjudged bad on demurrer, and the plaintiff has appealed. The record before us thus presents the single question whether a plaintiff who has sued in an action of malicious prosecution, for only such general damages as injury to his credit, feelings and reputation, is thereby estopped from afterwards suing upon the bond for such special damages as is covered by it.

There are but two cases where a former judgment prevents a plaintiff from prosecuting a second action; first, where he has recovered, or been defeated in an action to recover, the same thing he again seeks to litigate; or, second, where the plaintiff has split his cause of action, and in the second action seeks to recover that portion not sued for in the first.

In the case at bar the demurrer admits that the special damages now sued for were not actually embraced in the action for malicious prosecution, and were not then recovered. It only remains, therefore, for us to ascertain whether the plaintiff has split a single cause of action.

The Civil Code provides that an order of attachment shall not be issued until a bond has been executed by one or more sufficient sureties, to the effect that the plaintiff shall pay to the defendant all damages he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim (section 198).

It is not necessary that the party suing out the attachment shall sign this bond, although he may do so; but it must be executed by one or more sufficient sureties. An action can be maintained upon it if the order of attachment was "wrongfully obtained," regardless of the fact whether it was sued out maliciously and without probable cause. In such action the plaintiff can recover only such special damages as the expense and losses incurred in making his defense to the attachment, and the loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or loss or destruction thereof. (Pettit v. Mercer, 8 B. M., 52; Reidhar & Co. v. Berger, 8 B. M., 160; Burgen v. Shorer, 14 B. M., 500; Turpnall v. McAfee, 3 Met., 35; Johnson v. Farmers Bank, 4

Bush, 286; Drake on Attachments, section 175.); This action must be in assumpsit, for a breach of the covenant of the bond.

On the other hand, the action of malicious prosecution must be in case. Although the plaintiff may show that he order of attachment was "wrongfully obtanied" it will not be sufficient; he must both allege and prove that the proceedings were malicious and without probable cause. (Wood v. Weir & Sayre, 5 B. M., 546.) The extent of his recovery is ordinarily limited to such general damages as may be assessed for injury to his credit, reputation and feelings, for which exemplary damages may be awarded. He can neither prove nor recover any special damages, unless he has alleged them specially. (1 Chitty's Pleadings, 396; 2 Greenleaf on Evidence, section 254; Horne v. Sullivan, 83 Ills., 30; Miles v. Weston, 60 Ills., 361; Baldwin v. W. R. R. Corp., 4 Gray, 333; Squire v. Gould, 14 Wend., 159; Donnell v. Jones, 13 Ala., 490.) The plaintiff in the attachment suit can alone be sued in this action; the sureties in the bond can not be made parties thereto.

From this analysis of the two actions it is evident they differ widely, first, as to their form; second, as to the parties; third, as to the proof necessary to establish each; and, fourth, as to the extent of the recovery. It is also evident that they can not be joined in the same petition, for one is based upon a contract and the other upon a tort, and all of the parties are not concerned in each action.

The courts have clearly intimated (if they did not intend to decide) that the injured party can first recover upon the bond such special dagmages as it covers, and then prosecute his action for maliciously suing out the attachment. In Pettit & Owen v. Mercer, 8 B. M., 54, the court says: "We have come to the conclusion, therefore, although to defeat the action when brought on the bond the defendant must show the existence of the causes which, under the statute, are sufficient to authorize the attachment to issue, or such of them as were alleged and relied on by the complainant as the foundation of the order; yet the plaintiff, if he succeed, can only recover damages for the injury he may have sustained by being deprived of the use of his property, or its loss, destruction or deterioration, together with the costs and expenses incurred by

him in the defense of the suit; and for all other injuries he may have sustained he has to resort to his action on the case against the complainant, in which action his right to a recovery will be governed and determined by the principles of law applicable to such cases." This case was cited and approved in Reidhar & Co. v. Berger, 8 B. M., 160.

Again, in Cox v. Taylor, 10 Ben. Mon., 21, the court said: "And as was decided in the case of Pettit, &c., v. Mercer, above referred to, the existence or nonexistence of probable cause is immaterial in an action on the bond. It is clear from that case, as well as from what has already been said in this, that the action on the case and that on the bond are not, as remedies, co-extensive or commensurate, either as to the nature of the wrong or as to the extent or criterion of damages recoverable, and, therefore, there is no ground for the argument that the remedy by action on the case is merged in that on the bond. Nor are we prepared to decide that if they were altogether commensurate, or so far as they are so, the one is merged in the other."

The Supreme Court of Missouri also cites Pettit v. Mercer, and in language equally as forcible intimates that an action for malicious prosecution can be maintained after there has been a recovery upon the bond.

In Johnson v. Farmers Bank of Ky., 4 Bush, 286, the court, in discussing what portion of the costs incurred in defending an attachment suit were recoverable on the bond, said: "If the whole costs turn upon the defense to the cause of action then these are not recoverable upon the attachment bond; but if, as is often the case, they are incurred partly in defending the cause of action and partly in defending the causes of attachment, then they are recoverable so far as applicable to the attachment and expended in its defense. * * * But appellant's counsel seem to think this a great absurdity, because then anyone, without reasonable cause of action, could bring a suit against any nonresident or absent defendant, and though his cause of action and attachment should be defeated, the defendant would have no remedy. This argument is wholly based upon the ignoring the legal remedy by action for a malicious suit and attachment." Thus the court clearly

says that the remedies of the injured party are complete, in that he can recover upon the bond the costs of defending the attachment, and can recover in an action of malicious prosecution the costs for defending the cause of action itself. Although the action in that case was first upon the bond, yet there was no intimation from the court that the order could not be reversed; nor was there any such intimation in any of the cases above cited. And it would have been manifestly improper to have announced any such doctrine; for so soon as it is conceded that an action can be maintained upon the bond, first for the special damages, and then upon the case for the general damages, the position is established that there has been no splitting of a single cause of action, and, therefore, you can reverse the order at will. It will not do to say that the action for the general damages is the greater, and includes the lesser, while the action on the bond for the special damages, being the lesser, would not bar the action on the case for the general damages; for the rule against splitting actions recognizes no such distinction as this—if it has been violated the second action will be barred, no matter whether the greater or the lesser portion has been first sued for. (Powell v. Weiler & Co., 11 Ben. Mon., 186; Bancroft v. Winspear, 44 Barb., 209; Seimore v. Schencle, 29 N. Y., 508; Phillips v. Berick, 16 John., 1316; Thompson v. Sutton, 51 Ills., 213; 2 Chitt. Contr. [11 Am. Ed.], 1172, note c, and authorities cited.) Parsons states the rule to be: "He may bring his action for a part, but recovery in that action bars a suit for the remainder. As, if one has a demand for three articles under one contract, and sues for one, he can not afterwards bring his action for the other two. (2 Pars. Contr., 620.)

So far, therefore, as the rule against splitting a single cause of action is concerned it could make no difference that the action for malicious prosecution was first instituted.

There is a certain class of cases where a party is called upon to elect between an action ex delicto and an action ex contractu, and after the prosecution of one he can not institute the other. For instance, where a party has unlawfully taken and sold the goods of another the person injured can waive the tort and sue in assumpsit upon the implied promise to account for the proceeds; or he can recover damages in an ac-

tion ex delicto for the unlawful taking. But he can not do both, for the two are inconsistent with each other; he would not be heard to say in the one action that there was a contract, implied though it be, and in the other that there was no contract. Moreover, he would be seeking to recover twice for but the one injury.

But the procedings in the case at bar are not open to these objections. There is no inconsistency between the action on the bond and the action for malicious prosecution, and the demurrer admits that the special damages now sued for were not embraced in the first action.

Nor will it do to say that because he could have sued for the special damages in the first action he is now estopped from seeking to recover them by an action on the bond. In Cromwell v. County of Sac, 94 U. S., 353, the court says: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the orginal action, not what might have been thus litigated and determined. * * * These cases, usually cited in support of the doctrine that the determination of a question strictly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined."

So, in Walker v. Mitchell, 18 Ben. Mon., 546, the plaintiff, having first sued in ejectment for the possession of land and damages for its detention, commenced a second action for damages alone, and the court held that so far as the special damages then sued for were not actually essential in the first action they could be recovered in the second. The court said: "The plaintiff may unite in his petition claims for the recovery of specific real property and the rents, profits and damages for withholding the same. This is conceded to be a mere privilege, of which the party may or may not avail himself, according to his own discretion."

And again, Burr v. Woodson, 1 Bush, 606, the court said: "Although, as declared in section 111 of the Civil Code, the plaintiff may unite in the same petition 'claims for the recov-

ery of specific real property and the rents, profits and damages for withholding the same,' this is a privilege of which he may or may not avail himself, in his discretion. (Walker v. Mitchell, 18 Ben. Mon., 544.) And if the plaintiff shall elect to sue for the recovery of the land merely, or for that and for damages for being kept out of possession, in the same action, and seek by another suit to recover damages for trespass and injuries committed by the destruction of timber or other property upon or appurtenant to the land, a judgment in the one case would not, in our opinion, bar a recovery in the other."

So the fact that the appellant could have sued for the special damages in the first action is not in itself sufficient to estop him in this action—it was a mere privilege, of which he could avail himself at his discretion.

Nor should the courts be inclined to extend, to his prejudice, any of the established rules of pleading; for if he has suffered these special damages, and has never sued for nor recovered them, justice demands that he be allowed to proceed. The remedy by attachment is held everywhere to be a harsh one, and if the appellee has resorted to it both wrongfully and maliciously he should pay the damages which the law allows. That his action was malicious seems already to have been adjudged, and the court is not disposed to warp the well recognized rules of pleading in order to provide a protection for him from the results of his own maliciousness.

To hold that the action upon the bond must first be determined would be a virtual denial of the right to resort to the action for malicious prosecution, since the latter would be barred by limitaion in one year. The hardship in this would be great, for often the bond, being only for double the amount claimed in the attachment suit, would be wholly insufficient to cover the damages sustained by the malice of the wrongdoer. While, on the other hand, if the bringing of his action for malicious prosecution first is to be held a bar to the subsequent action on the bond, the injured party will be thereby deprived of the benefit of the security for a portion of his damages, which the statute has provided for his protection. There is no rule of pleading by which the appellant can be compelled to chose between these two dilemmas.

The judgment is, therefore, reversed and the cause remanded, with directions to overrule the demurrer to the reply, and for further proceedings.

Judge Reid delivered the following dissenting opinion:

On March 25, 1876, D. W. Forman sued out an attachment against the property of appellant Hall, executing bond with W. H. Forman as his surety. The attachment was discharged on final hearing, and Hall sued D. W. Forman alone for damages resulting to his credit, character and feelings, for maliciously and without probable cause suing out the attachment, and recovered a judgment which was satisfied by the execution of a replevin bond.

Hall then instituted this action on the attachment bond, against D. W. and W. H. Forman, the surety, to recover damages for fees, costs and expenses incurred in defending the attachment, and for injuries resulting from the seizure and sale of the property.

To this action the appellees pleaded the former suit, and recovery and satisfaction of the judgment, as a bar, the court so held, and this is the only question involved in this appeal.

It is mathematically as well as legally true that the greater includes the lesser, but the lesser does not include the greater. Had suit been first brought on the attachment bond and recovery had, it would have been no bar to a subsequent suit for a malicious suing out of the attachment. The covenants of the bond do not bind the surety for unlimited or indefinite damages. The measure of recovery on the bond is the injury sustained by being deprived of the use of the property, or its loss or deterioration, decline in value, together with fees, costs and expenses necesarily incurred in defending the attachment. The plaintiff in such case is not required or allowed to show malice, nor can the defendant, by way of defense, rely upon probable cause. The recovery is limited, and for all other injuries sustained, such as to credit, character and feelings, outside of what the terms of the bond cover, the aggrieved party must resort to his action in the nature of an action on the case against the party alone who has committed the wrong, the surety on the attachment bond not being liable. In other

words, the two kinds of action are essentially distinct, and furnish separate and independent modes of redress. The action on the bond compensates, generally speaking, for injury to the rights of property; the action for maliciously suing out an attachment furnishes redress for all other injuries, for which no recovery could be had under the stipulations of the bond. But the latter action is the greater, and includes the lesser. In it a party can recover as against the wrongdoer, upon appropriate averments, not only for damages resulting to the credit, feelings and character, but also for all damages growing out of the wrongful conduct of the party taking out the attachment, which would also embrace all that might be recovered in an action on the bond, and when a party elects to bring such an action first, and recovers a judgment which is satisfied, the recovery and satisfaction of the judgment is a complete bar to a subsequent suit on the bond, and conclusive not only as to what was actually litigated, but as to every point which could have been put in issue and properly belonged to the subject of litigation. (Francis v. Woods, &c., 4 Ky. Law Rep., 616, Pryor, J.)

It does not alter the principle that the pleadings show that what was sued for in this case was not sued for in the former action. It ought to have been sued for; it could have been put in issue, and properly belonged to the subject of litigation.

The recovery in that suit and its satisfaction was a waiver of a subsequent action on the bond—a complete bar to it, no matter if the law gives two concurrent remedies. When the mode that furnishes complete redress has been chosen, and a judgment had and satisfied, public policy and the repose of society demand that no second action be allowed for damages that might have been recovered in the first.

It is true that a party may sue in ejectment and afterwards for mesne profits, and this because the latter do not necessarily belong to the main subject of litigation. A party may or may not include both in the same action, at his election. But an action for maliciously suing out an attachment necessarily embraces every injury sustained. What may be recovered on the bond essentially and inherently belongs to the former action, may be included in it, may be recovered in it,

and when a party selects the wider field for redress reason and the analogies of the law require that he should set up all he claims, assert every element of damages, and not be allowed to vex and harass his adversary and his surety by another suit, in the hope of another recovery, when he has in his pocket the proceeds of a satisfied judgment in an action ample enough in its scope to furnish complete compensation for every injury.

These views are not in conflict with the case of Pettit & Owen v. Mercer, 8 Ben. Mon., 51. That was an action on the bond. The lower court allowed evidence to be introduced by the plaintiff, conducing to prove loss of credit by the issuing of the atachment against him, which was properly held to be error. The court, in that case as well as in Reidhar & Co. v. Berger, 8 Ben. Mon., 160, fixed the measure of recovery on the bond, and held that in such cases no damage could be recovered for injury resulting to credit, wounded sensibilities or deranged business operations. In the first named case, it is true, the court says, "and for all other injuries ('outside of the recovery on the bond') he may have sustained he has to resort to his action on the case against the complainant, in which action his right to a recovery will be governed and determined by the principles of law applicable to such cases;" but it does not decide that when the party has chosen to employ the larger mode of redress in which he can have full compensation for all the wrongs inflicted on him, he can afterwards use the lesser. At most the case but impliedly holds that the use of the lesser remedy does not prevent the use of the greater. It can not be distorted to mean that the use of the greater also allows the lesser remedy.

My conclusion, therefore, is that upon the discharge of an attachment the aggrieved party has two separate modes of redress. He may sue the principal and his surety on the bond, and recover compensation for injuries to his property, for fees, costs, etc.; and he may maintain an action against the wrong doer alone for all other injuries, not legally recoverable in the action on the bond, but when he elects to first sue the wrong-doer on the ground that the attachment has been sued out maliciously and without probable cause, in which action he can claim compensation commensurate with all the

injuries, of every character, to personal and property rights he has received, and recovers a judgment which is satisfied, he can not subsequently maintain an action on the bond, the former action being res adjudicata not only as to what was, but as to what ought to have been, litigated.

The judgment in my opinion should be affirmed.

G. B. Nelson for appellant.

Haggard & Jones for appellees.

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## DUGAN'S ADM'R v. MITCHELL.

(Filed June 6, 1883.)

**1. Limitation—Action to settle decedent's estate—The pendency of an action to settle a decedent's estate does not suspend the operation of the statute of limitation against the claims of creditors of the decedent.**

**2. Presentation of creditors' claims—Creditors have the right either to appear before the commissioner and present their claims without written pleadings, and thus become parties to the action, or to set them up by pleadings, and where they see proper to adopt the latter mode the case should be treated as if written pleadings had been required.**

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Reid.

The action in which the judgment appealed from was rendered was a suit brought November 4, 1878, by appellant, as administrator, against the heirs and creditors of Henry Dugan, to settle his estate. No injunction was asked or obtained restraining creditors from bringing or prosecuting suits. On July 18, 1879, appellee, for the first time, appeared and filed her petition to be made, and was made, a party, in which she set up a note for $400, executed May 6, 1867, and due at one month, by her brother, A. J. Philpott, and Henry Dugan, credited by interest paid to May 6, 1870. By the same order filing the petition the claim was referred to the master for his report therein, which was filed the next day, allowing the debt and interest. On December 5, 1879, appellant filed exceptions to the report, and also an answer in which it was alleged that Dugan was only the surety on the note, and the statute of limitations was also pleaded. It appears from subsequent pleadings, which admit that Dugan was a mere surety on the

note, that Dugan died in January, 1871; that a curator was appointed to take charge of Dugan's estate in March, 1871; that administration was granted on his estate October 30, 1873, and that the suit to settle the estate was instituted, as stated, November 4, 1878. The pleadings and the exceptions to the allowance of the claim present the same question. The court rendered judgment for $400, with interest from May 6, 1870, and the administrator appeals.

The only question is whether the claim is barred by the statute of limitations. As Dugan died in January, 1871, as the personal representative was qualified on the 30th of October, 1873, as the note matured June 6, 1867, and was not asserted in the suit until July 18, 1879, it is manifest that, making all proper deductions, more than seven years had elapsed from the time of the accrual of the cause of action, until the filing of the petition, and that the claim is barred unless the action brought November 4, 1873, to settle the estate, operated to suspend the running of the statute.

We premise that this case is to be tried on the pleadings. Appellee had the right, as creditor, either to appear before the commissioner, present her claim without written pleadings, and thus become a party to the action, or to set it up by the pleadings, and where parties see proper to adopt the latter mode the case should be treated as if written pleadings had been required (Sargent, &c. v. Fariar's Ass'ee, 2 Ky. Law Rep., 212, Cofer, J.); and in the opinion the court further says "that if on the pleadings, as they stood at the time of the trial, the appellants were entitled to recover, judgment should have been rendered in their favor without regard to the evidence, and vice versa."

Section 432, Code, was not designed to prohibit creditors of a decedent from prosecuting their claims by pleadings. It provides a simple and inexpensive mode for the assertion of claims, saving cost both to the creditor and the estate, but at most furnishes a cumulative, and not exclusive, remedy.

As to the main question, it has been held in Kentucky that even where an injunction is granted at the instance of a personal representative, on his filing a petition to settle the es-

tate, it does not suspend the operation of the statute, but that claims must be asserted within the proper time.

In Barnes, &c. v. Green, &c., 3 Ky. Law Rep., 253, Pryor, J., the administrator filed his petition in 1864 for the settlement of the estate, and obtained an injunction against creditors. Sundry creditors filed their claims before the master, but they were not sufficiently proven. In 1866 or 1867 the petition and proceedings under it were filed away. In 1877 the widow and children of the decedent filed a petition against the administrator for a settlement of his accounts, and for judgment against him. On motion of the defendant creditors who had filed their claims the old suit was redocketed, consolidated with the new case brought by the widow and children, and the creditors asked the court to render judgment for their claims. The widow and children pleaded the statute, and the court held it was a bar.

In Biggs, &c. v. Lexington & B. S. R. R., &c., 3 Ky. Law Rep., 268, Hargis, J., Biggs died in 1868, and his administrator having qualified in June, 1868, filed his petition October 26, 1868, to settle the estate, the personalty of which he alleged was insufficient to pay the debts. All claimants were enjoined from bringing or prosecuting suits on any of their demands, or from any proceedings on them except in the suit to settle the estate. On November 2, 1869, the railroad company, joining their assignors, Hartman & Coleman as coplaintiffs, filed their answer and cross petition, setting up a large claim for deficit in lands conveyed by Biggs to Hartman & Coleman. On November 13, 1871, Hartman & Coleman had the cross petition dismissed as to them, and on October 28, 1873, they united with the company in an amended petition, and for reasons stated asked to be reinstated as coplaintiffs in the petition setting up the claim, which was done. Biggs' administrator filed an amended answer, pleading the five years' limitation. The court held that the cause of action to recover for the alleged deficit in the quantity of land accrued in June, 1869, when the mistake was discovered; that the bar was complete October 28, 1873, when Hartman & Coleman were reinstated as coplaintiffs in the amended cross petition; that the statute,

having begun to run, was obstructed by the injunction obtained at the commencement of the administrator's action to settle the estate; that "the injunction granted did not stay appellee's action, it only prescribed when and how he should institute it."

If the injunction granted in actions to settle trust estates and the estates of deceased persons, to prevent multiplicity of suits where one suit furnishes a remedy for all parties who may be interested, is not effectual to suspend the running of the statute, a fortiori, the mere institution and pendency of an action for that purpose without a restraining order against the creditors can not be allowed to have that effect, and creditors must be held to the assertion of their demands within the statutory period.

As the pleadings stand the claim of appellee was barred.

Wherefore the judgment is reversed and the cause remanded, with directions to sustain the plea of limitations and to dismiss appellee's petition.

Geo. W. Williams for appellant.

R. W. Slack for appellee.

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## THE PADUCAH & ELIZABETHTOWN R. R. CO. v. FLETCHER.

(Filed June 16, 1883.)

1. Special verdict—Where either party requires it the court should direct the jury to return a special verdict only, and if it fails to do so, and both a general and special verdict are returned, on appeal the court will only look to see whether the judgment is supported by the special verdict.

2. Willful negligence—In an action for willful neglect, under section 3 of chapter 57 of General Statutes, a special verdict having been demanded, the court should have instructed the jury as to what "willful neglect" was, and then left it to them, by questions properly framed, to decide whether it existed, and the jury having not passed on the question of willful neglect their special verdict is not sufficient to support a judgment for the plaintiff.

3. To authorize a recovery under this statute it is essential to prove willful neglect.

4. Negligence having been denied, whether there was any, and the degree thereof, were questions of fact for the jury, to be determined by them under the directions of the court.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Richards.

This is an appeal from a judgment for damages recovered for killing the husband of the appellee. The first section of chapter 57 of the General Statutes provides that a personal representative may recover where the decedent has lost his life by the negligence or carelessness of the proprietor of a railroad, or by the unfitness or negligence or carelessness of its agents. The third section of said chapter provides: "If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

The appellee did not sue under the first section as personal representative of the decedent, but under the third section as his widow. She could not recover, therefore, unless she proved that her husband lost his life by the "willful neglect" of the appellant or its agent or servants.

It is urged that the court erred in instructing the jury, but we can not inquire into this, since the instructions themselves are not made a part of the record by order of court or bill of exceptions.

The appellant moved the court to direct the jury to find a special verdict only, which motion the court overruled and directed the jury to return both a general and special verdict.

Under the old Code of Practice this motion was within the discretion of court (L., C. & L. R. R. Co. v. Case's Adm'r, 9 Bush, 734); but the rule has been changed by the new Code. It is now provided that "unless otherwise directed the jury may find a general, or a general and separate general verdict; or a special verdict, with or without a general or a separate general verdict; but the court may, without motion, or upon the motion of a party, shall direct the jury to find * * * a special verdict, and on such finding the jury shall return a special verdict only, and the court shall render judgment upon it." (Section 327.) While the verbiage of this is open to criticism in so far as it relates to the special verdict on the special verdict, yet it is evident the legislature intended that

when either party demanded it the court should direct the jury to find a special verdict only. It was, therefore, error to direct the general verdict when objected to by appellant; but as the jury also returned a special verdict, the court must be presumed to have disregarded the general verdict, and rendered its judgment solely upon the special findings, as it was its duty so to do. It only remains, therefore, to examine whether the special findings were sufficient to support the judgment.

A freight train on appellant's road, in passing the Henry Station, took from the switch six cars, pushing them in advance of the engine, intending to transfer them to the rear at Hamilton Station, which was one-half mile distant, where they had proper switching facilities for this purpose. The jury finding that in turning a curve between the two stations the six cars in advance of the engine passed over the deceased, who was lying intoxicated on the appellant's track. The facts relied on to sustain the charge of willful negligence are that the employes on the train did not see the deceased as soon as they ought to have done, and that their failure to see him was due to the cars in front of the engine, upon which it is alleged there was no one as a lookout.

To use the language of the court in Board of Internal Improvements of Shelby County v. Scearce, 2 Duvall, 579: "We consider this a penal case, though prosecuted for the benefit of the 'widow' of the deceased. The vital element indispensable to recovery is willful wrong; mere involuntary negligence is not enough."

"However great the want of care, caution, attention or diligence, punitive damages can not be awarded unless the neglect of the corporation, its servants or agents, is so great as to evidence reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty, in the performance of which the public has an interest. The motive must be bad. The negligence must be quasi criminal." (Jacobs v. L. & N. R. R. Co., 10 Bush, 273.)

"To authorize a recovery under this act it is essential that the loss of life shall have been the result of willful neglect." (City of Lexington v. Lewis, 10 Bush, 680.)

The defense in this action was based upon a denial of negligence on the part of the company, and the allegation that the deceased lost his life by his own negligence. Whether there was any negligence on the part of either plaintiff or defendant, and the degree thereof, were questions of fact to be determined by the jury under directions of the court as to the law. It is only when the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, that the court can decide the question of negligence as a matter of law. (Shearman and Red. on Neg., section 11.)

Or, as has been said by our appellate court, "the theory of our judicial system is that questions of fact are for the jury and questions of law for the court. When, therefore, all the facts essential to the plaintiff's case are agreed, or established by uncontradicted evidence, nothing remains but for the court to decide whether there was negligence. But unless all the essential facts are agreed, or proved without contradiction, the court can not decide whether there was negligence or not." (Dolfinger & Co. v. Fishback, 12 Bush, 478.)

So it was said in L. & N. R. R. Co. v. Collins, 2 Duvall, 115, "the degree of it (negligence) was a question of fact which, on such apparently conflicting testimony, the jury have a right to decide."

And in the case of L., C. & L. R. R. Co. v. Mabery, 7 Bush, 237, the court, after stating the facts relied on, said: "Whether these and other facts developed on the trial sustained the charge of willful neglect it was the peculiar province of the jury to determine." To the same effect the cases of Johnson v. Castleman, 2 Dana, 382, and Dawson v. L. & N. R. R. Co., 4 Ky. Law Rep., 810.

But when we examine the special verdict in the case at bar we find that the jury has not passed upon the question of willful negligence, nor did the interrogatories submitted to them require that they should. It was still a question for the jury, notwithstanding their verdict was to be special. The verdict having been demanded in this form the court should have instructed the jury as to what willful negligence was, and then left it to them, by questions properly framed, to decide whether it existed. While the court has the power to determine

whether the verdict of the jury upon this question, as upon all others, is supported by the testimony, yet without such finding the court has no authority to render judgment in a case where the negligence is denied.

Juries should not be permitted to state what they "think," but should be required to find from the evidence the facts themselves. But as the defendant did not object to the form of the verdict when returned, and moved for judgment thereon, the defect is treated as waived.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Holmes Cummins and P. H. Day for appellants.

Walker & Hubbard for appellee.

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## GEDGE v. SHOENBERGER, &c.

(Filed June 6, 1883.)

1. Landlord and tenant—Landlord's lien—A distress warrant or attachment for rent must be sued out in ninety days after the rent is due in order to give the landlord's lien for rent a preference over other incumbrances, as provided by section 12, chapter 56, General Statutes. When the landlord chooses to have his rent payable monthly, quarterly, or semi-annually, he can not wait until ninety days after the expiration of the rental year before proceeding to assert his lien.

2. The landlord's lien is strictly a legal right, and not favored in equity. His rights have been enlarged by statutory enactments, and the privileges so granted should not be extended by construction, but repressed within the limits of the statute.

3. A stipulation by a tenant to pay a certain rent, and "also to pay all taxes and assessments during said term," does not give the landlord a lien for the taxes, they not constituting any part of what was agreed to be paid as rent, either by express terms or by implication.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Reid.

On April 29, 1873, Johnson, as trustee for Mrs. Fabian, leased a lot in Covington, Ky., to Holmes for the term of ten years, beginning May 1, 1873, at $150 per year, the rent payable semi-annually on May 1 and November 1. Holmes also covenanted to pay all taxes and assessments. On this lot he erected four small tenement houses.

In 1848 Holmes leased from Shoenberger another lot in Covington, for the period of five years, at $300 per annum, rent payable quarterly in advance. January 1, 1879, this rent was reduced, by agreement, to $200 per year, and payable at the end of each quarter. On this lot Holmes put steam apparatus for making tiles and retorts.

On November 26, 1877, Holmes executed a mortgage on all his interest in the property on both lots to Mary A. Gedge, to secure the payment of a note of $1,000.

On September 25, 1879, appellant sued to subject the property to her mortgage, to which action the landlords and tenants were made defendants.

Fabian's trustee answered, claiming a superior lien for the installments of rent, due November 1, 1878, May 1, 1879, and November 1, 1879, of $75 each; for $147.76 State and city taxes, and for $6.50 costs of a distress warrant sued out in October, 1879. The Shoenbergers set up a similar claim for $75, due April 1, 1878; $75, due July 1, 1878; $75, due October 1, 1878; $50, due January 1, 1879; $50, due April 1, 1879; $50, due July 1, 1879; $50, due October 1, 1879, and for $10.73, the costs of two distress warrants sued out by them August 1, 1879, and September 8, 1879.

The court adjudged a priority over the mortgagee in favor of Fabian's trustee for $150, with interest from May 1, 1879, the two installments of rent due May 1 and November 1, 1879; for $74.82 city and State taxes, and for $6 costs of the warrant; and in favor of the Shoenbergers for $200, with interest from June 15, 1879, made up of the respective installments of $50 each, under the changed contract, falling due January 1, April 1, July 1 and October 1, 1879, and for $10.73, the costs of the two distress warrants, and Mrs. Gedge appeals.

The only serious contention between the parties arises under section 12, chapter 56, General Statutes. This section reads as follows: "All valid liens upon the personal property of a lessee, assignee, or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and upon property on which the landlord hath a superior lien for

his rent, then to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied, provided the same is sued out in ninety days from the time the rent was due."

It is conceded that the mortgage was executed whilst the property was on the leased premises, and that the property is such as by section 18, the landlord has a superior lien on for his rent.

The landlords insist that the meaning of the statute is that they have a lien superior to that of the mortgagee to the extent of one year's rent, having sued out their distress warrants within ninety days from the expiration of the year from the time the year's rent was due; while appellant contends that the priority does not extend to rent due and payable more than ninety days before the warrant was sued out; and that, under the written lease between Holmes and Johnson, trustee for Mrs. Fabian, there is no lien at all for city or State taxes.

The lease is for the term of ten years, at $150 per year, payable semi-annually. The stipulation to "also pay all taxes and assessments during said term" is an independent one, and does not constitute any part of what is agreed to be paid as rent, either by express terms or by implication. The language is, "at the yearly rent of $150; also to pay all taxes and assessments during said term, said rent to be paid in equal semi-annual payments." * * * The second party "doth covenant to pay to the said party of the first part the said yearly rent, as herein specified, in half-yearly payments of $75 each, on the first day of each and every November and May during this lease, ending 1883." The obligation to pay the taxes might have been made a part of the rent, but upon the failure of the parties to so provide we are not inclined to enlarge, by construction, the terms of the contract.

The statute under consideration confers upon the landlord a lien superior to all others created while the property is on the leased premises to the extent of one year's rent, but before this property can be made available he must sue out his distress warrant or attachment within ninety days from the time the rent is due. The words referring to the preference, as to the distress or attachment, "provided the same is sued out in ninety days from the time the rent is due," are found for the

first time in the General Statutes, and their import is plain and unambiguous. If it had been designed to extend the operation of the lien ninety days beyond the time a year's rent was due, it would have been an easy task to say, "provided the same is sued out in ninety days after the expiration of the year." But the legislature chose to say that the distress or attachment, in order to secure the lien over other liens, must be sued out in ninety days after the rent is due; and the evident legislative intent was, while giving the landlord a preference over the other creditors of the tenant, to require him to sue out his process in ninety days after the rent was due, to compel him to use diligence in asserting his claim, and not to allow him, when he chose to have his rent payable by the month, quarterly, or semi-annually, to wait until ninety days after the expiration of the rental year before proceeding to assert his lien. Whenever his rent is due by the terms of the contract the right to sue out a distress or attachment exists, and a failure to do so for ninety days subordinates the lien for rent thus due to other valid incumbrances.

The landlord's lien is strictly a legal right, and not favored in equity. Before the statutes a tenant could, during his term, sell or mortgage his goods and chattels, and the purchaser or mortgagee could hold them in defiance of any lien claimed by the landlord, as resulting to him by law from the relation of landlord and tenant, and the equitable interest of the mortgagor was not liable to be sold under a distress for rent. (2 Dana, 204; 3 J. J. M., 432; 4 Dana, 22.)

The landlord's rights have been enlarged by statutory enactments, conferring upon him extraordinary remedies, and the privileges so granted should not be extended by construction, but repressed within the limits of the statute. Evils may be imagined under either interpretation of the statute insisted on in this case, but we find nothing that justifies a departure from the plain letter of the law. If hardships are to be mitigated, it is the province of the legislature, and not that of the courts, to furnish the remedy.

It results from these views that Fabian's trustee was entitled to priority for only $75, due November 1, 1879, with legal interest until paid, and for $6, costs of the warrant; and the Shoenbergers to $50, due July 1, 1879, and $50, due October

1, 1879, with legal interest until paid from the dates each installment was due, and for $10.78, costs of the two warrants.

The judgment is reversed and cause remanded, with directions to render judgment as herein indicated.

Collins & Fenley for appellant.

Benton & Benton for appellees.

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## BURGESS v. BURGESS, &c.

(Filed June 6, 1883.)

1. Validity of bail bond in civil action—A bail bond in a civil action must be given "in the presence of the sheriff, or of the jailer, if the defendant has been committed to jail," and the officer has no authority to accept a bond signed out of his presence and handed to him by a third party.

2. If it be conceded that such a bond is good as a common-law obligation no recovery can be had thereon in the absence of allegations showing that actual damage came to the plaintiff by reason of the prisoner's release.

3. Appellate practice—Assignment of errors—On appeal from an ordinary judgment the appellate power extends only to reversing the action of the lower court respecting especial errors particularly pointed out by assignment, and an assignment as error "that the court rendered judgment for the defendants," raises merely the questions whether the judgment conformed to the verdict, and was sustained by the pleadings.

Appeal from McCracken Circuit Court.

Opinion of the court by Presiding Judge Bowden.

In this action on a bail bond alleged to have been duly taken, approved, attested, and returned by the jailer, the defendant resisted recovery on the ground that the defendant in the civil action was not in custody when the bond was signed, but that he was at liberty and brought the bond to them in the country and procured them to sign it in the absence of the jailer. A jury was not demanded, the issue of fact was tried by the court, and a judgment was rendered for the defendant. No statement giving conclusions of law or of fact was asked for or made. A motion for a new trial was overruled. It presented three grounds: First, that the judgment was against the law and evidence; second, that irregularity in the proceedings of the court prevented a fair trial; third, that there were "accident and surprise which ordinary prudence could not well have guarded against." What the accident was, or what caused

the surprise, is not stated, but we presume it related to the alleged irregularity in the conduct of the court, which seems to have consisted in entering judgment after the testimony had been heard and argument had been made by appellant's counsel on one branch of the law involved, and without giving him an opportunity to argue another question, upon which the court had promised to hear him.

The second and third grounds are not, however, assigned as "particular" errors. The fifth assignment is that the court refused to grant a new trial "for the reasons set forth in the application and affidavit." If this is sufficiently specific, still we could not say that the appellant was prejudiced by the failure of the court to hear the argument; nor can we say that the failure was an abuse of discretion; nor do we think that it would be necessarily the duty of a court to hear whatever argument parties might desire to submit.

The first and third assignments, complaining of the admission of illegal evidence, were not presented as grounds for a new trial, and can not be considered.

The second and fourth assignments are that the court rendered judgment for the defendants, and did not render judgment for the plaintiff.

They raise merely the questions whether the judgment conformed to the verdict or was sustained by the pleadings. When the facts are tried by the court a party may require a statement showing the conclusions of fact which will on appeal be treated as the special verdict of a jury. In the absence of such a statement we can not know what the court found as facts, and, therefore, we can not say that the finding did not justify the judgment. On appeal from a judgment in equity the case is retried on its merits, and the general rule is that the court will direct what judgment shall be entered by the lower court. But on appeal from an ordinary judgment the appellate power extends only to revising the action of the lower court, respecting special errors particularly pointed out by assignment; we are prohibited by positive law from considering any other. The Code precludes a revision of an act of the lower court, which is wrong merely because it is the result and outcome of preceding errors; in that case the appel-

lant is required to point out and assign the germinal error in order to get rid of its natural results.

The only question presented is whether the pleadings support the judgment. It assumes that the court only heard legitimate testimony; that it gave to all of it a proper value, and that it reached a correct conclusion of fact of which the judgment is the exact expression. Nevertheless, if the plaintiff was entitled to a judgment on the pleadings, whatever that conclusion may have been, and notwithstanding it the court erred in rendering the judgment. But if he was not so entitled there was no error in the act rendering judgment for the defendant, though that act was the result of many other preceding errors.

If the bond sued on was not a good statutory bond the judgment can not be questioned, even if it were conceded that it was good as a common law obligation. It does not stipulate for the payment of money, but only that the defendant shall render himself amenable to the process of the court. The petition does not allege that he had any property, or that any actual damage came by reason of his release. If he had rendered himself amenable to the process of the court payment would not necessarily have followed. It differs from cases where bonds are given to pay money, such as bonds to supersede or enjoin, guardian and sale bonds, and the like.

The bond given under the statute in cases of arrest does not have the effect of a judgment. Section 172 of the Code provides that an action shall be brought to enforce it, and section 173 permits various defenses. Section 171 declares that the liability of the bail shall be to pay the amount of the judgment and costs. The petition alleges everything necessary to constitute it a statutory bond, except that it was given in the presence of the jailer. The answer presents none of the statutory defenses, but seeks to show, by allegations respecting the time, place and circumstances of its execution, that it is not a statutory bond, and, therefore, could not create the statutory liability for the judgment and costs.

We must assume that the finding of the court sustained the allegations of the answer, and can consider only their sufficiency.

By section 168 of the Code it is provided that "bail may be given by the defendant on his arrest, or at any time after it, before judgment, by giving bond with good surety to the plaintiff, in the presence of the sheriff, or of the jailer, if the defendant have been committed to jail. * * * The bond, when accepted, shall be returned to the clerk's office, and the defendant shall be discharged."

The answer alleged that when the bond was signed Burgess was not under arrest, or in the custody of the jailer, or of any other officer, but was free and at large, by the consent and permission of the jailer, who then had in his hands, in the shape of collaterals of value, a good and sufficient bond for his appearance; that the bond was signed by them in the country, no one being present but themselves and Burgess, and that the jailer was not nearer than ten miles.

If it were conceded that, notwithstanding the facts stated, Burgess was legally in the custody of the jailer, though out of jail, and that the jailer was authorized to take a bond and discharge him from legal custody, still he had no authority under the statute to accept a bond signed in the country and sent to him by a third party. In Hardin v. Owings, 1 Bibb., 214, an appeal bond was signed and acknowledged before two witnesses in the country; the law required it to be executed in the clerk's office, and it was held insufficient. In Horne v. Mitchell, 7 Bush, 181, a bond to procure an attachment was held insufficient, not having been executed in the clerk's office. Jones v. Bunn, 2 Met., 490, applies the same rule. A jailer can not discharge his official duty by accepting as a bond a paper handed to him by a third party, upon whose statement he must rely that the parties appearing there as obligors signed the bond for the purposes recited. He can not know, when accepting it, and when discharging the defendant from custody by reason of it, that he has taken any bond at all. The plain letter of the law requires that the bond shall be given in his presence; that its execution shall be a fact within his official knowledge; "that the evidence of its execution shall be at hand," as was said in Horne v. Mitchell. While the allegations of the answer may be regarded as curing the omission by

the plaintiff of the averment that the bond was executed in the jailer's presence, we must take it that the proof was according to the answer.

The judgment is affirmed.

Gilbert & Reed and W. Lindsay for appellant.

Rhea Boyd for appellees.

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## GATHRIGHT & CO. v. McNEIL.

(Filed April 18, 1883.)

1. Affidavit for attachment—The facts necessary to procure an attachment may be set out in the petition, but it must be verified by an affidavit, which is a written declaration under oath subscribed by the affiant, with the certificate of the officer written separately.

2. Amendment of affidavit—A plaintiff may, by an amended affidavit, cure a defect in his affidavit for an attachment, or may state a new ground of attachment, and thus acquire a lien, but it can not affect a lien previously acquired.

3. There can not be an affidavit which is not subscribed by the affiant, and, therefore, where an attaching creditor has failed to subscribe his affidavit he can not be allowed to do so, so as to affect a lien already acquired by another attaching creditor.

Appeal from Hardin Circuit Court.

Opinion of the court by Presiding Judge Bowden.

McNeil sued Moore and had an attachment issued and levied December 11, 1879, on personal property. Gathright & Co. sued Moore and had an attachment issued and levied December 12, 1879, on the same property. The actions were consolidated; and thereupon Gathright & Co. moved the court to discharge McNeil's attachment on the face of the papers. McNeil's petition contained all the statements required to procure an attachment, and was subscribed by his attorneys. In place of the usual affidavit this followed:

"C. M. Fraize says that he is the agent of the plaintiff, Frank McNeil, and that he is absent from Hardin county, and that the statements made in the foregoing petition are true.

"J. W. MATHIS, P. J. H. Q. C."

Pending this motion a personal judgment was rendered in favor of Gathright & Co. against Moore, and an order was made sustaining their attachment; afterwards their motion to discharge McNeil's attachment was sustained. Next day McNeil moved the court to permit Fraize to subscribe his name

where that of J. W. Mathis was written, and to permit Mathis to write his certificate below, which was allowed to be done, against the objection of Gathright & Co.

On the motion of McNeil to set aside the order discharging his attachment no action was taken, but on his subsequent motion an order was made reinstating the attachment. Finally the court adjudged that McNeil had a prior lien, and a payment to him of the proceeds of the attached property, which had been sold, was ordered.

The facts necessary to procure an attachment may be set out in the petition, but it must be verified by an affidavit (Code, section 116), which is a written declaration, under oath (section 544), subscribed by the affiant, with the certificate of the officer written separately (section 551).

That which appeared on the paper was a certificate of the county judge that he had administered to Fraize the oath therein set out. And from the affidavits of Fraize and Mathis it appears that that is exactly what was done. The order allowing Fraize to subscribe did not, as argued, merely supply the evidence of "what was actually done;" it permitted something to be done which had not before been even attempted. It was not in the nature of an order allowing an officer to amend his return or certificate to conform to the facts, for the certificate stated the facts with perfect accuracy; but it permitted a new act to be done, and a new certificate to be written certifying the fact of subscription, which was not, and could not have been, certified before, as it did not exist.

The statute defining an affidavit is too clear to allow construction. It is a positive law that does not even require interpretation. Only one meaning can be extracted from it. No attachment can be properly issued until an affidavit has been made, containing certain required statements. It is not a refinement, as counsel suggest it would be, to enforce a statute as it is written, especially when it can not be supposed to mean, or to be capable of meaning, something different from what it says. It would be a refinement, even to the verge of exercising a dispensing power, to try to show that there is no need to comply with the demands of plain, unambiguous lan-

guage, because, in the nature of things, some other method than that prescribed might serve as well.

By section 268 of the Code a plaintiff may, by an amended affidavit, cure a defect in his affidavit, or may state a new ground of attachment, and thus acquire a lien, but it can not affect a lien previously acquired. We are, therefore, of the opinion that as to the property not included in McNeil's mortgage Gathright & Co. had a prior lien.

The judgment is reversed, with directions to order the payment of the proceeds of that property to appellants.

Montgomery & Marriott for appellants.

Montgomery & Poston for appellee.

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## CROUCH v. RUBLE, &c.

(Filed March 30, 1883.)

**Action on indemnifying bond—It is the duty of the officer taking an indemnifying bond to return it to proper office in order that the injured party may know whom he may sue, and the officer is discharged from liability by its execution conditioned only on his complying with the law in making due return of it. If he fails to return it and is required to answer to the injured party he can not maintain an action on the bond to indemnify himself.**

Appeal from Washington Circuit Court.

Opinion of the court by Judge Bowden.

The appellees executed to appellant, then a constable, an indemnifying bond required before levying an execution in favor of Ruble, then in the appellant's hands. The execution was levied on property which was sold. A claimant of the property sued the appellant for the seizure and sale, and after a litigation, somewhat protracted, recovered a judgment for $65.18 damages and $36.85 costs, which appellant paid. He then brought an action against appellees on the bond of indemnity, which he filed as part of his petition, and which had on it no endorsement showing that it had been returned to the office designated by the law, nor does the petition allege that it ever had been returned. A demurrer to the petition was sustained.

The object of the law in permitting an officer to require the bond was to protect him "against the consequences of any violation of the rights of others which he might commit in the

levy of, or sale under, an execution," and the taking and returning of the bond, creating a bar to an action against the officer, was intended to prevent the circuity of action that would have followed if the required party could have sued the officer in the first place, leaving him to sue on the bond for redress.

The bond is required to be returned to the proper officer, in order that the injured party may know whom he may sue. If it is not returned, he may sue the officer and all concerned in the illegal seizure of his property. If it is returned, he must sue the obligors in the bond, and can not sue the officer.

While the language of the bond imports a stipulation that the obligors will indemnify the officer against any damages he may sustain, yet the provisions of the law, whereby the taking and returning of the bond bar the injured party of any action against the officer, must be regarded in determining its legal effect.

If the bond is taken and returned, it is not possible that the officer can sustain any damages. He is not even liable to an action. In that case, taking stipulation and law together, the bond could not be construed as an obligation to pay damages that could not be sustained, but as an obligation merely to pay any claimant damages he might sustain, and to warrant the title to the property sold, and thus, by this obligation, and only in this way, to indemnify the officer. The legal value of the bond as one of indemnity to the officer does not, therefore, consist in its being a covenant to pay him, in any event, any damages he may sustain, but it consists in its being a covenant to be personally bound to claimant and purchaser, which, by positive law, releases the officer and substitutes the obligors.

It was the duty of the officer to return the bond. By its execution he had been discharged from liability, conditioned only on his complying with the law in making due return of it. If he had done his duty he could not have acquired a right of action on the bond, nor have become liable for the levy or sale. He did, however, what he had the right to do; he waived the discharge provided for him; he resumed his liability as it existed independent of the statute; he took his chances. This was the result of his failure to return the bond.

By a failure to discharge a plain duty he could not create a right that would not have existed if he had done his duty. As between him and the obligors it is not unfair to say that he sustained damages, not by reason of making the levy and sale, but by reason of his failure to return the bond.

Moreover, it were gross injustice to permit an officer to retain a bond of indemnity, thus make himself liable to the claimant, allow himself to be sued, incur costs at pleasure, and then call on sureties in the bond to pay costs, which, perhaps, would not have been incurred if the bond had been returned and the claim had been made against them.

The judgment is affirmed.

Russell & Avritt for appellant.

J. C. Wickliffe for appellees.

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## BOONE, TRUSTEE, &c. v. GLEASON, &c.

(Filed May 16, 1883.)

1. Towns and cities—Street improvements—The notice which the charter of the city of Louisville requires to be given by the city engineer of the time and place fixed for the inspection and reception of improvements on the public ways is sufficient, although published but once, and that on a holiday.

2. Service of notice on a holiday—The provisions of the statute as to the service of notices, etc., on a holiday relate exclusively to notices in civil actions, and have no application to the notice the engineer is to give under the charter of the city of Louisville.

3. Two days' notice by the engineer is sufficient to enable property owners to make their complaints, if any they have.

4. Acceptance of improvements by city engineer conclusive—The engineer is vested with quasi judicial authority, and when he accepts the improvements and the council approves his action the property owners can not resist payment on the ground of a defective execution of the work.

5. Interest—The property owner is under no obligation to pay anything until the cost of the improvement has been apportioned as provided by law, and the plaintiff is entitled to interest only from that date.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Richards.

The alleged error in overruling the demurrer to the petition will not be examined as no exceptions were entered to the order when made. Moreover, the petition has been since amended, and the defendants do not demur to it as it now stands.

The second error assigned relates to a step in the preparation of evidence prior to the former appeal. When leave has been given a party to amend his proof prior to the first appeal, and such order is passed over in silence by the Court of Appeals, it can not be reviewed upon a subsequent appeal.

It is complained that the court permitted the transcript of the council proceedings to be withdrawn for further authentication after the case had been reversed; but if this was error, it has been waived by the failure of the appellants to except to the order when made.

The fourth error assigned is that "the court erred in its order of January 21, 1881, in overruling and not sustaining each of the following exceptions of defendants to the plaintiffs' evidence, viz., exhibits, depositions, alleged copies, warrants, etc., numbered respectively 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19." But these exceptions were not copied into the record, nor were they called for by the schedule.

After the reversal the plaintiff offered an amended petition, to which the defendants objected "on the ground that the Court of Appeals and the order herein of June 27, 1879, only authorized and permitted the plaintiff to introduce evidence to prove that the ordinance asserted by the plaintiff had been published, and nothing more." The fact that the chancellor had not given the permission to amend on June 27, 1879, was no reason why he should not permit the amendment to be filed when approved in April, 1881. Nor was there anything in the opinion and mandate of the Court of Appeals to prevent him from exercising his discretion in this matter. On the contrary, the language of the mandate was: "It is, therefore, considered that said judgment be reversed and the cause remanded for further proceedings."

On February 9, 1877, appellants filed exceptions to the "exhibits, etc., filed with the petition, because the same was incompetent and without any proper authentication." On May 14, 1880, leave was given to the plaintiff to withdraw this exhibit for the purpose of having it properly certified. It was refiled in court June 18, 1880, with its attestations materially

changed. The exceptions previously filed are insufficient to raise the question of its authenticity in its present form.

Exhibit B, filed with the amended petition, relates exclusively to the apportionment. It is unnecessary for us to consider the exceptions filed to this exhibit, as the parties, by an agreed order entered June 14, 1881, made for themselves a corrected apportionment, and the judgment entered follows that agreement.

By an act approved February 20, 1874, amending the charter of the city of Louisville, it is provided: "Where improvements on the public ways have been made, and the contract therefor completed, the city engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the city engineer; and such owners, agents and representatives may appear and be heard before such engineer as to whether such improvements have been made in accordance with the ordinance authorizing the same, or the contract therefor."

Several exceptions were filed to the notice given by the city engineer under this provision. The action of the chancellor in overruling these exceptions is assigned as an error. We will consider them in their order:

"1st. It was only published once, and that on the 25th of December—a holiday and holy day."

The charter only requires that the notice be published once.

The law has always recognized the Christian Sabbath as "a day of rest," on which citizens of the realm were to be free from all secular disturbance. The laws of King Athelstan forbade all merchandising on the Lord's Day under very severe penalties. By 27 Hen. VI the prohibition was extended to "fairs" or "markets" under pain of forfeiting the goods exposed to sale. By 1 Car. I, it was made unlawful for persons to assemble out of their own parishes on Sundays for any sport whatever, and prohibited plays, and the baiting of any bull or bear within the parish. And by 26 Car. II, all work, except works of necessity or charity, was prohibited on that day. This statute also provides that no arrest could be made nor

process served upon a Sunday, except for treason, felony, or breach of the peace.

As early as 1796 an act was passed in Kentucky declaring any process or writ executed on a Sunday illegal and void, except in cases of treason, felony, riot, breach of the peace, or upon an escape out of prison or custody. That statute has been re-enacted, in one form or another, down to the present time. The provision in the General Statutes is that "no process or notice on which any legal proceedings are to be founded, except as herein provided, shall be executed on Sunday; the execution of either on that day shall be void. But a writ of habeas corpus, or process on a charge of treason, felony, or for a riot or breach of the peace, or upon an escape out of custody, may be executed on Sunday." (Chapter 100, section 12.) And those exceptions have been still further enlarged by section 665 of the Civil Code. But never until the adoption of the Code of 1854 was there any statute in Kentucky against the service of a process or writ on a holiday. Although the Court of Appeals has decided, in the case of Paul v. Bruce, 9 Bush, 317, that a summons executed on a holiday should be quashed upon the motion of the defendant, unless the plaintiff shows the case to be within one of the exceptions, still these provisions can not be extended to the case at bar. The Code relates exclusively to summonses, subpœnas, notices, etc., in civil actions, and has no application to the notice the engineer is to give under the charter of the city of Louisville. While we have a statute declaring that "no work or business shall be done on the Sabbath Day, except the ordinary household offices, or other work of necessity or charity," there is no such prohibition in regard to holidays. They are only to be treated as Sundays "for all purposes regarding the presenting for payment or acceptance, and for protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange." The objection that the notice was published on December 25 is not well taken.

"2d. Because there was not sufficient time given between the date of the publication, 25th of December, and date appointed for the inspection, 27th of December." As the improvements are made in front of the property of the defendants,

it is to be presumed they will be familiar with the ordinance and contract under which the contractor is proceeding before the work is completed, and will keep posted as to the character of the work as it progresses. Two days' notice is, therefore, sufficient to enable them to prepare to make their complaints to the engineer, if any they have.

"3d. Because the name of the engineer's 'representative' was not given—and the charter requires the inspection, etc., by the engineer in person."

The notice was that the work would be inspected "by the city engineer or his representative." The words "or his representative" are superfluous, and the notice is sufficient. It is not claimed, on this appeal, that the work was not inspected by the city engineer in person. The charter gives the property owners the right to "appear and be heard before such engineer as to whether such improvements have been made in accordance with the ordinance authorizing the same, or the contract therefor." On such occasions the engineer is vested with quasi judicial authority, and when he accepts the improvements, and the council approves his action, the property owners can not resist payment on the ground of a defective execution of the work. (Murray v. Tucker, 10 Bush, 240.) As to what would be the effect of an attempt to delegate this authority by the city engineer it is unnecessary for us to decide in this case.

"4th. Because said notice was insufficient and void, and not a compliance with the city charter." (Section 4, act February 20, 1874.)

We know of no act of that date amending the said charter. We presume it was intended to refer to the act of February, 1873. But, tested by that statute, we fail to discover in what respect the notice is "insufficient and void," and we find no brief for appellants in the record to assist us.

The remaining errors assigned are to the effect that the court erred in rendering the judgment. The pleadings are sufficient to support it, and we must presume that the evidence was also, as the decree recites that certain testimony was heard on the trial which we do not find copied in the transcript.

The property owner is under no obligation to pay anything until the cost of the improvement has been apportioned as

provided by law. This was not done until the filing of the agreement, on June 14, 1881, and the plaintiff was only entitled to interest and costs from that date.

Wherefore, the judgment is affirmed, both on the original and cross appeals.

J. Rowan Boone for appellants.

Geo. B. Eastin for appellees.

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## ABSTRACTS OF DECISIONS OF COURT OF APPEALS—NOT TO BE REPORTED.

### HOWELL v. COMMONWEALTH.

Filed June 5, 1883. Appeal from Boyd Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

1. Criminal law—Unlawfully detaining a woman against her will—Section 9, article 4, chapter 29, General Statutes, which provides a punishment for unlawfully taking or detaining a woman against her will, etc., was enacted to reach that class of cases which do not embrace an intent to commit a rape, or which may not be susceptible of proof of such an intent, and at the same time to punish every taking or detention by a man of a woman against her will with intent to have carnal knowledge with her himself, or that another shall have such knowledge, whether or not accompanied with the attempt to commit a rape upon her person.

2. The word "woman" is used synonymously with female in the statute, and to constitute the offense described it is not required that the person taken or detained should be over fourteen years of age.

L. T. Moore, D. D. Eastham and T. R. Brown for appellant.

P. W. Hardin for appellee.

### OWENS v. COMMONWEALTH.

Filed June 5, 1883. Appeal from Greenup Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

1. Criminal law—Unlawfully detaining a woman against her will—An indictment charging appellant with the offense of taking and detaining a woman against her will with intent to have carnal knowledge with her does not charge two distinct offenses, although the language of the statute is: "Whosoever shall unlawfully take or detain a woman against her will," etc. Either the taking or detention, or both, constitute the single offense described by the statute.

2. It is no defense to such a charge that a rape was either attempted or accomplished.

B. F. Bennett and W. A. J. Rardin for appellant.

P. W. Hardin for appellee.

### McBRIDE v. McLAUGHLIN.

Filed June 5, 1883. Appeal from Henderson Circuit Court. Opinion of the court by Judge Pryor, reversing.

Fraudulent conveyance—A conveyance to the wife of land paid by the husband out of his own means is fraudulent as to the husband's preexisting debts.

Thomas E. Ward for appellant.

COLVIN v. STINNETT.

Filed June 2, 1883. Appeal from Washington Circuit Court. Opinion of the court by Judge Lewis, reversing.

Homestead—A debtor is entitled to a homestead as against a liability created by the conversion of a note, the homestead having been purchased prior to the conversion, although subsequent to the execution of the note.

W. E. Russell and W. E. Selecman for appellant.

John W. Lewis for appellee.

HIGHBAUGH'S EX'OR v. BRUNK.

Filed June 14, 1883. Appeal from Hart Circuit Court. Opinion of the court by Judge Pryor, Judge Lewis not sitting.

1. Satisfaction of legacy—At common law a gift to the legatee by the testator during his lifetime of a portion equal to or exceeding the legacy was a satisfaction of the legacy; or, if the provision was less, it was a satisfaction pro tanto, it being only necessary that the provision should be ejusdem generis.

2. The fact of a legacy being made to the sisters and brothers of the testator in the first place, and in the event of their death to their children, did not prevent the testator from satisfying the legacy in the lifetime of the principal devisees; so where the parent, after the execution of the will, received the legacy, the child can not get it, or if the parent received any part of it his children must account for it.

3. Gifts made prior to the execution of the will can not be included in the estimate made, but the sums of money paid over after that date to the principal devisees, or to their children after their death, should be estimated.

A. B. Montgomery and J. W. Twyman for appellant.

I. T. Woodson for appellee.

HUNDLEY v. BUSH.

Filed June 14, 1883. Appeal from Washington Circuit Court. Opinion of the court by Judge Lewis, reversing.

The appellant purchased the land of appellee at judicial sale, agreeing to allow appellee to redeem the land within three years by paying amount of bid and interest. At the end of three years appellee, who had retained possession of the land, being unable to redeem, voluntarily agreed to occupy the land as appellant's tenant and pay rent while occupying it, and gave a mortgage to secure the payment of one year's rent. Held—That while in cases where there is an implied trust, or the mere holding of the legal title as a security for money advanced, the time of redemption would not ordinarily be material, yet, as there was in this case, at the end of the three years, a renunciation of the right to redeem, and a voluntary agreement to thereafter hold the land as tenant and pay rent therefor, the appellee can not now be allowed to redeem.

W. C. McChord for appellant.

W. E. Selecman and A. Duvall for appellee.

## CUMMINS v. COMMONWEALTH.

Filed June 14, 1883. Appeal from Mason Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

1. Criminal law—Larceny—To constitute larceny it is not necessary that the taking should be by the hands of the thief himself, but it is sufficient if the thief procure an innocent person to take the property for him.

The appellant told S. he wished to sell him a sow and pigs, and after agreeing on the price went to where a sow and pigs were lying on the commons and pointed them out as his, and S. paid him for them and drove them off. Held—That appellant was guilty of larceny, and not merely of obtaining money by false pretenses.

2. Bill of exceptions—The order overruling the motion for a new trial was not entered until the term succeeding that at which the judgment was rendered; but the judge certifies in the bill of exceptions that the motion was overruled during the previous term and before the judgment was rendered, but by oversight of the clerk the order was not entered. Held—That the statement in the bill of exceptions must be considered as true, no effort being made to controvert the bill.

Thos. R. Phister and L. W. Galbraith for appellant.

P. W. Hardin for appellee.

## MINOR v. COMMONWEALTH.

Filed June 16, 1883. Appeal from Lincoln Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

1. Criminal law—Plea of former jeopardy—In a felony case the jury were empaneled and sworn before the defendant was arraigned or entered his plea. So soon as this was done his counsel moved to discharge him, the court overruled the motion, directed the arraignment, and the defendant pleaded not guilty and former jeopardy by reason of the irregularity named, and thereupon the same jury was regularly sworn to try the issue. Held—That the premature swearing of the jury did no harm, as they were subsequently, and at the proper stage, duly sworn before the introduction of any evidence.

2. Lodging of jury—The lodging of the jury at a hotel, on its second floor, in different rooms along the same hall, in which the sheriff locked them at night, there being no pretense that they were tampered with, was a sufficient compliance with the requirements of the Code relative to keeping the jury together.

Welch & Saufley for appellant.

P. W. Hardin for appellee.

## McKNIGHT, &c. v. JACOB, &c.

Filed June 16, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Chief Justice Hargis, affirming.

Title of purchaser at judicial sale—A purchaser at judicial sale having received what he bought has no right to complain that the manner of advertisement was defective, as increased competition by reason of more thorough advertisement could not have been of any benefit to the purchaser.

Temple Bodley and Byron Bacon for appellants.

A. E. Willson, John B. Baskin and R. W. Woolley for appellees.

## OSCHSVER v. GERMAN BUILDING AND SAVINGS ASSOCIATION.

Filed June 16, 1883. Appeal from Kenton Chancery Court. Opinion of the court by Chief Justice Hargis, affirming.

A homestead right is waived by a widow electing to take under the will of her deceased husband, which passed to her all his estate, subject to the payment of all his debts.

Stevenson and O'Hara & Bryan for appellant.

Simmons & Schmidt for appellee.

## RYAN v. COMMONWEALTH.

Filed June 9, 1883. Appeal from Kenton Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Reading of minutes of examining court—The reading of the minutes of the examining court, to the extent only that they showed that the defendant had been arrested, could not have prejudiced the defendant.

2. Evidence of the defendant's escape from jail was competent to go to the jury.

3. Indictment for having burglars' tools in possession—The indictment against appellant for having in his possession implements and tools used for housebreaking, which charges that he had in his possession such implements with the felonious intention of using them for the purpose of housebreaking, etc., is sufficient.

M. L. Roberts for appellant.

P. W. Hardin for appellee.

## JOHNSON, &c. v. CORBETT, &c.

Filed June 9, 1883. Appeal from Warren Circuit Court. Opinion of the court by Judge Pryor, affirming.

Contract procured by fraud—Agreement by widow to take a child's share of her husband's estate in lieu of her dower and distributable share. J. died intestate, leaving an estate worth about $75,000, consisting largely of cash notes and money. He had been married twice, and his second wife and an infant child by her and eight children of the first marriage survived him. On the day after the burial the widow and children met at the home place, and while there a lawyer was sent for and a contract reduced to writing, and signed by the widow and children, whereby the widow agreed to take a child's share of the estate in lieu of her dower and distributable share as widow. The widow thereafter received from the administrators pursuant to this contract a child's share of the estate, amounting to about $7,500, for which she executed her receipt in full, and thereafter repeatedly expressed her satisfaction with the contract. About two years after the death of her husband the widow married again, and thereupon brought suit in equity to have the contract with the heirs rescinded and to recover her dower and distributable share in her former husband's estate. Held—That the widow, who was an illiterate woman, unable to write her own name, was ignorant of her rights as widow and was the victim of a conspiracy upon the part of her stepchildren to deprive her of her lawful interest in her husband's estate, and that she is, therefore, entitled to recover.

Rodes & Settle, Wright & McElroy, Wilkins & Sims and E. W. Hines for appellants.

B. F. Procter, John M. Galloway and Wm. Lindsay for appellees.

### HANEY v. COMMONWEALTH.

Filed June 12, 1883. Appeal from Lyon Circuit Court. Opinion of the court by Chief Justice Hargis, reversing.

1. Criminal law—Dying declaration—Upon a trial for murder the dying declarations of the deceased, when offered against the accused to convict him, should be confined to facts and not allowed to extend to mere matters of opinion; but when the declaration is offered by the accused and it will explain the acts and conduct of the deceased, or show his feeling, motives, intent, or belief, an exception should be made to the general rule excluding matters of opinion or belief.

In this case the court improperly rejected the dying declaration of deceased that "he brought it all on himself; he did not blame John Haney for shooting him; he alone was to blame."

2. Such declarations are not merely opinion. Being uttered by a participant whose opportunity for knowing whether he was to blame was greater than that of any one else, they explain the intent and motives with which he was actuated in the part he played, and exhibit those internal facts, constituted of feeling, motive and judgment, which will greatly assist the jury in understanding the true nature and object of his acts as proved by other witnesses.

F. A. Wilson and R. W. Wake for appellant.

P. W. Hardin for appellee.

### BUCHANAN v. THE CRUCIBLE STEEL CASTING AND METAL CO.

Filed June 12, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Chief Justice Hargis, affirming.

1. A deed for more land than the grantor owns operates to convey so much as he can lawfully convey.

2. While a decree for the sale of more land than was necessary to pay the plaintiff's lien was erroneous, it was not void, and the title acquired by the purchaser at the sale under the decree is good.

Bullitt & Harris for appellant.

Garvin Bell, Rodman & Brown and A. P. Humphrey for appellee.

## ABSTRACTS OF SUPERIOR COURT DECISIONS.

### ARNETT v. COMMONWEALTH.

Filed June 6, 1883. Appeal from Magoffin Circuit Court. Opinion of the court by Judge Reid, affirming.

1. Allowance of claims by circuit court. The circuit court is not bound to allow each claim presented to it that appears on its face to be correct, but has the right to have each claim investigated, to examine witnesses, and to hear testimony and allow or reject as the evidence may warrant, and upon appeal from an order of the court refusing to allow a claim, in the absence of a bill of exceptions or anything else showing on what the court based its conclusions, the presumption is that the evidence authorized the rejection of the claim.

2. Presumption on appeal—Upon appeal everything necessary to sustain the judgment of the inferior court, which is not inconsistent with the facts stated in the record, will be presumed.

J. & J. W. Rodman and J. E. Cooper for appellant.

P. W. Hardin for appellee.

## HARRIS, &c. v. HARRIS' ADM'R.

Filed June 6, 1883. Appeal from Warren Circuit Court. Opinion of the court by Judge Richards, affirming.

1. Appellate practice—Papers not made of record—Where letters that the court refused to admit as evidence have not been made a part of the record, either by order of court or bill of exceptions, they can not be examined in the appellate court.

2. Prejudicial error—A judgment can only be reversed for an error which the record shows to have prejudiced the substantial rights of the party complaining. Where the complaint is that books have been read to the jury, and the bill of exceptions contains no copy of such books, nor a statement of what they conduced to prove, the court can not know that the appellant has been prejudiced by permitting them to be read.

3. Testimony as to transaction with decedent—The testimony of the administratrix about one transaction with the decedent could not make either of the appellants a competent witness for himself concerning a different transaction.

4. When two persons are sued as joint bailees of personal property and as jointly liable for its return, neither one is competent to testify that any portion of the property was given by the decedent to the other, for such evidence would tend, pro tanto, to exonerate the witness.

Rodes & Settle for appellants.

Halsell, Mitchell & Potter for appellee.

## THRUSTON v. DAVIS, &c.

Filed June 6, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Richards, affirming.

1. Suit upon indemnifying bond—Pleading—A petition by a claimant upon an indemnifying bond given to secure the sale of personal property levied upon by an officer that fails to allege that the defendants have not performed its covenants, is defective in that it alleges no breach.

2. Defect in petition not cured by answer—This defect is not cured by an answer that is confined to denials of the allegations of the petition; nor will the plaintiff be heard to say that it is cured by a verdict and judgment that he himself is seeking to set aside. But there being no demurrer, the defendant must pay the cost.

Wilson & Hobson for appellant.

Montgomery & Poston and Montgomery & Marriott for appellees.

## McCRACKEN COUNTY v. EDWARDS.

Filed June 6, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Richards, reversing.

Compensation of jailer—The fees allowed a jailer for keeping, dieting and providing for a prisoner embrace all such service as keeping the jail clean and free from nauseous vapors, and furnishing fuel, lights, water, etc. While he can charge for fuel furnished the circuit court during its term, he can make no special charge for coal consumed in keeping the jail warm.

W. F. Bradshaw for appellant.

L. D. & W. L. Husbands for appellee.

## POSTON v. LOUISVILLE & NASHVILLE R. R. CO.

Filed June 6, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Richards, affirming.

1. Defective pleading cured after verdict—The rule of law that a petition, defective by reason of the omission of a material allegation, is cured, after verdict, by denials in the answer of such omitted allegations, is as much applicable to a trial upon an agreed state of facts as where the facts have been established by testimony.

2. Liability of railroad company running its cars over tracks of another company—A railroad corporation running its cars over a track by virtue of a lease from the corporation owning the roadbed is liable for injuries done to live stock by its trains.

3. Failure of railroad company to inclose line with lawful fence—Sections 6, 7 and 8 of chapter 57 of the General Statutes only apply to railroads that have not enclosed their lines with a good and lawful fence, with sufficient cattle gaps, and where it is intended to proceed under this statute the plaintiff should allege the facts showing it to be applicable to the corporation sued.

4. That statute was not intended to make one corporation liable for the torts of another, when such liability did not previously exist.

Montgomery & Poston for appellant.

Wm. Lindsay for appellee.

## LONG, &c. v. ALDRIDGE'S ADM'R.

Filed June 6, 1883. Appeal from Logan Circuit Court. Opinion of the court by Judge Richards, reversing.

1. Instruction as to damages—An instruction that permits the jury to assess damages at any amount in their discretion, so the amount claimed in the petition is not exceeded, regardless of the testimony, is erroneous.

2. Judgment for personal property or its value—In an action to recover two mules, or the value thereof, and damages for their detention, it was error to render a judgment in the first place for the value of mules, which the defendants could not discharge by delivering the mules. The judgment should have been for the mules, or their value, with damages.

L. C. Garrigus for appellants.

W. W. Lyles for appellee.

## RUDY v. DEWING.

Filed June 6, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Jurisdiction—Service of process—A single defendant sued in the Daviess Circuit Court was served with process in McLean county. No reason for such service appearing, it is held that a judgment by default was erroneous.

Little & Slack for appellant.

## HEAVERIN v. OTTER & CO.

Filed June 6, 1883. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Appeal—Trial of facts by court—Where the facts in an ordinary action are tried by the court, if either party desires to appeal, he must have the court to state its conclusions of fact, being its special verdict on the evi-

dence, and its conclusions of law, being the equivalent of instructions to a jury, and then proceed as if there had been a trial by jury which had returned the same verdict under the same rules of law given as instructions.

2. Upon appeal the presumption is in favor of lower court, and the general rule is if a bill of exceptions does not purport to contain all the evidence that it will be assumed there was testimony to justify the court in giving the instructions which were given, but where an instruction given could not have been authorized by any evidence that might have been submitted the court may reverse for the error, although all the evidence is not before the court, and so where the court has tried the facts and a conclusion of law drawn by the court could not have been authorized by any evidence the court will reverse for the error, although the bill of exceptions does not purport to contain all the evidence.

3. Limitation—An endorsement of a partial payment on a note, when the fact of payment is contradicted, is not evidence sufficient to suspend the running of the statute of limitation, and much less can the endorsement of a payment upon a copy of a book account have such an effect. It was, therefore, error for the court to hold that the plaintiffs were entitled to recover, unless the defendant should show by a preponderance of the evidence that he had not made a payment endorsed upon the copy of the account sued on, which was relied on to avoid the plea of limitation.

Wilson, Hobson & Sprigg for appellant.

J. S. Wortham for appellees.

## DUGAN'S ADM'R v. MITCHELL.

Filed June 6, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Reid, reversing.

1. Suit to settle decedent's estate—Creditor may present claim with or without pleading—In a suit for the settlement of a decedent's estate a creditor may appear before the commissioner, present his claim without written pleadings, and thus become a party to the action, or may set it up by written pleadings, and where he sees proper to adopt the latter mode the case should be treated as if written pleadings had been required, and if on the pleadings, as they stand at the time of the trial, the creditor is entitled to recover, judgment should be rendered in his favor without regard to the evidence.

2. Limitation—The institution and pendency of an action for the settlement of a decedent's estate does not suspend the running of the statute of limitation against the claims of creditors.

The creditors must assert their demands within the statutory period.

G. W. Williams for appellant.

R. W. Slack for appellee.

## SMITH, &c. v. TAYLOR'S ADM'R.

Filed June 6, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Reid, affirming.

Landlord and tenant—Measure of damages for failure of landlord to complete barn—A lessor having failed to comply with his contract to complete a barn upon the leased premises by a specified time the lessee is not entitled to recover special damages to his tobacco crop by reason of such failure, there being no allegation that the sole or chief use of the barn was for the housing of the tobacco, and that it was so understood when the contract was made.

Little & Slack and E. W. Hines for appellants.

W. N. Sweeney & Son for appellee.

GEDGE v. SHOENBERGER, &c.

Filed June 6, 1883. Appeal from Kenton Chancery Court. Opinion of the court by Judge Reid, reversing.

1. Landlord's lien—Section 12 of chapter 56, General Statutes, confers upon landlords a lien upon the personal property of their tenants superior to all others created while the property is on the leased premises to the extent of one year's rent, but before this priority can be made available the landlord must sue out his distress warrant or attachment in ninety days from the time the rent is due; where the rent is payable before the expiration of the year he can not wait until ninety days after the expiration of the year before proceeding to assert his lien.

2. The landlord's lien is strictly a legal right and not favored in equity. The extraordinary remedies conferred upon the landlord by statute should not be extended by construction, but repressed within the limits of the statute.

Collins & Fenley for appellant.

Benton & Benton for appellees.

VAN BIBBER'S ADM'R v. VAN BIBBER, &c.

Filed June 13, 1883. Appeal from Louisville Chancery Court. Affirmed by a divided court, Judge Richards not sitting. Separate opinion by Judge Bowden.

1. Insurance—Presbyterian Mutual Assurance Fund—Beneficiary—Beneficiary of policy—Section 4 of the charter of the Presbyterian Mutual Assurance Fund provides that "the object of this corporation is to create and provide a beneficiary fund for the families or relations of deceased members, or for the benefit of members in sickness." Section 6 provides that "upon the decease of any member of the association the fund to which his family is entitled shall be paid as may be designated in the application for membership; this being changed by death or otherwise impossible, it shall go, first, to the widow and infant children; second, to his mother and sisters," etc. The certificate of membership provides that the amount due thereon shall be paid to such person or persons as the insured "may designate by will or upon the books of the corporation have directed the same to be paid."

Held—1. That the word "relations" should either be taken as merely fixing the larger meaning of the word "family," or that the latter word, when used alone, means all that was meant by "family or relations," and that the member, therefore, can designate any one of this family as the beneficiary, and if the one so designated, by reason of his death, or any other cause, can not take it, then the member can designate any other member of the family as the beneficiary.

2. When the person designated dies before the death of the assured, and no other person is designated, the fund goes to the widow and infant children, etc., of the insured, and not to the widow and infant children of the person designated.

Separate opinion by Judge Reid:

The insured, when the certificate is issued in his name, may designate by will who of his family or relations shall be the beneficiary, or the designation may be made in the application. If either mode be pursued the benefits go, as indicated by section 6, to the relations of the insured. But when the beneficiary has been named it is he and his family that are to be provided for. The assured has then no title to the fund, no control over it, and if the beneficiary named be dead the fund is to be paid, under section 6, to his widow and children, and not to the widow and children of the insured.

Duke, Richards & Baskin for appellant.

Ward & McAfee for appellees.

## PADUCAH LUMBER CO. v. LANGSTAFF, ORM & CO.

Filed June 13, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Reid, reversing.

Service of attachment—Notice of debt sought to be attached—The object of subsection 3 of section 203, Civil Code, in requiring an attachment to be executed upon a debt or demand due the defendant by delivering to the person owing it a copy of the order with a notice specifying the debt or demand attached, was primarily to protect the garnishee by identifying the debt and to notify him it was attached, and when the garnishee answers, setting out the amount he owes and when it will be due, there is a waiver of any objection to the service by reason of the failure of the notice to specify the debt or demand sought to be attached, and another creditor subsequently suing out an attachment and having it served upon the same garnishee, with the requisite notice, does not thereby acquire priority over the first attaching creditor.

Wm. Lindsay for appellant.
Henry Burnett for appellees.

## COMMONWEALTH v. GILBERT & REED.

Filed June 18, 1883. Appeal from Calloway Circuit Court. Opinion of the court by Judge Reid, affirming.

1. In a proceeding upon a forfeited bail bond or recognizance the undertaking, which is the basis of the action, must, in connection with the order of forfeiture, present a perfect cause of action, and as the record in this case fails to show that there was any order of forfeiture, it does not present a perfect cause of action.

2. While mere irregularities in the execution of a bail bond are not sufficient to render it invalid, it must be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged therefrom by reason of giving the bond, in addition to the ascertainment from the bond itself that the bail undertook that the defendant should appear before a court for the trial of the offense charged against him.

P. W. Hardin for appellant.
W. M. Reid for appellees.

## DRAKE'S ADM'R v. SEMONIN.

Filed June 13, 1883. Appeal from Webster Circuit Court. Opinion of the court by Judge Richards, reversing.

Pleading—Petition on merchant's account—No judgment can be recovered on a petition upon a merchant's account that does not allege that the goods were delivered to the defendant, nor that they were sold to him at his special instance and request; nor that they were worth the amounts charged therefor in the account; nor that the defendant promised to pay the amount charged.

C. W. Cook for appellant.
M. C. Given for appellee.

## BARNETT'S TRUSTEE v. FEICHHEIMER, &c.

Filed June 13, 1883. Appeal from Madison Circuit Court. Opinion of the court by Judge Richards, reversing.

1. Parties to appeal—No one is a party to an appeal unless named as such in the statement required to be made on the transcript, or is subsequently made a party by order of court.

2. When a receiver has been appointed upon the motion of several parties, in each of whom the record discloses an interest, such order will not be reversed on appeal when only a portion of those so interested are made appellees.

Smith & Mason for appellant.
C. F. & A. R. Burnam for appellees.

## KENTUCKY CENTRAL R. R. CO. v. CLARK.
## SAME v. FENNESSEY.
## SAME v. O'DONNELL, EX'OR.

Filed June 16, 1883. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Lot owners have a property right in adjacent streets—The owners of town lots have a peculiar private right in the streets appurtenant to their lots, which is as much property as the lots themselves, and any appropriation or obstruction of the street that deprives the lot owner of its reasonable use deprives him to that extent of his property, and this species of property can not be taken for public use without just compensation.

2. Compensation for obstruction of streets—An agreement by a railroad company to pay lot owners a certain sum per annum in consideration of the agreement upon their part to allow the company to maintain its track and depot arrangements on streets appurtenant to their lots for the period of two years was obligatory on the company that made it, and, therefore, enforcible against the appellant, to which that company transferred its road, rights, privileges, right of way, etc.

O'Hara & Bryan for appellant.

Simmons & Schmidt for appellees.

## ALTMAN & TAYLOR CO. v. JOPLIN, &c.

Filed June 16, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Reid, reversing.

1. Contract presumed to be verbal—Where it does not appear from the petition that the contract sued on was in writing it must be presumed that the contract was verbal, although the record may contain what purports to be a written contract.

2. The plaintiff can only recover upon proof of the cause of action alleged in the petition, and, therefore, having sued on a verbal contract, can not recover on proof of a written contract, different at least in some important particulars from that sued on.

Wilson & Hobson for appellants.

Montgomery & Poston for appellees.

## KENTUCKY TOBACCO ASSOCIATION v. ASHLEY.

Filed June 16, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Reid, reversing.

1. Deposition can not be used when witness is present—The deposition of a witness can never be substituted for his oral testimony when he is present in court, laboring under no disability.

2. Erroneous instruction—An instruction is misleading which singles out one fact or element of the evidence and gives prominence to it over others.

3. Errors to be corrected by motion in court below—For a mistake in entering a credit which could have been corrected from the record on motion in the court below, made after the term during which the judgment was rendered, no reversal can be had, no such motion having been made.

Owen & Ellis for appellant.

W. N. Sweeney & Sons for appellee.

## PRATHER v. PHELPS, &c.

Filed June 16, 1883. Appeal from Washington Circuit Court. Opinion of the court by Judge Reid, affirming.

1. Errors treated as waived on appeal—Every error occurring in the trial of an ordinary action that is not specifically mentioned in the motion and

grounds for a new trial will be treated as waived on appeal, although embraced in the assignment of errors.

2. The notice by a surety to the creditor requiring him to sue, for which section 11 of chapter 104 of the General Statutes provides, is sufficient to exonerate the surety, if given in writing and received by the creditor. It is not required to be served by an officer or a third person; the surety himself may deliver it.

L. R. Thurman and J. W. Lewis for appellant.

W. H. McCord for appellees.

CUMBER & PEARCE v. CHANDLER.

Filed June 16, 1883. Appeal from Robertson Chancery Court. Opinion of the court by Judge Richards, granting a rehearing and reversing.

1. Execution sale—Venditioni exponas—Where there has been a sale of land under execution and the purchaser fails to execute his sale bonds the plaintiff can, by motion, have the sale set aside and a venditioni exponas issued, under which there can be a resale for his benefit.

2. If before this is done other parties, who claim liens upon the same land, sue in equity to forclose them and make the execution creditor a party, the chancellor should, the execution creditor consenting, sell the property and distribute the proceeds according to the priorities of the parties.

3. Mortgage only a security—In Kentucky a mortgage conveys the legal title simply as a pledge for the mortgage debt, but confers on the mortgagee none of the rights of ownership.

Winfield Buckler for appellant.

B. G. Willis for appellee.

BAKER v. McARTHUR.

Filed June 13, 1883. Appeal from Campbell Circuit Court. Opinion of the court by Judge Richards, reversing; Judge Reid dissenting.

1. Action against attorney for failure to collect note—Pleading—A party can not recover damages from a lawyer for failing to collect a note without alleging that he owns the note or has some interest in its collection; nor can he recover without alleging facts from which the law will imply the promise.

2. Where there is nothing in the answer curing these defects the judgment will be reversed upon the pleadings alone, although the law and facts have been tried by the court.

Dissenting opinion by Judge Reid:

1. The failure of the petition to allege in express terms that the plaintiff was the owner of the note is distinctly cured by the answer, which, in substance, admits that the plaintiff was the owner of the note.

2. The averment that the defendant permitted the claim put into his hands for collection to stand until it was barred by limitation, and that the plaintiff was unable to collect it, is equivalent to a statement that by reason of the defendant's negligence lapse of time prevented the collection of the claim.

E. W. Hawkins for appellant.

A. Duvall for appellee.

RANDLE v. CITY NATIONAL BANK OF PADUCAH.

Filed June 13, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Richards, reversing; Judge Reid dissenting.

1. Bills and Notes—Pleading—If it is intended to hold the defendant as either drawer or endorser of a bill of exchange the facts necessary to create the liability must be alleged.

2. Payment of bill presumed from possession by acceptor—Where a bill of exchange has found its way back to the possession of the acceptors the pre-

sumption is that it has been paid, and a bank that has discounted the bill for such acceptor can not hold the drawer and endorser without negativing this presumption by the allegation of such facts as that the bill was drawn and endorsed for the accommodation of the payers.

3. In an action against the drawer or endorser it must be alleged that there has been due protest and notice, or the facts showing such notice and protest must be stated.

Dissenting opinion by Judge Reid:

1. In an action by a bank upon a bill drawn by the defendant, made payable to his order and endorsed by him, it sufficiently appearing from the petition that the defendant executed and signed the paper, and that the bank discounted it for value, enough is stated to hold defendant as drawer, although the petition may not state a cause of action against him as endorser.

2. An allegation that the notary "immediately protested said bill for nonpayment and mailed notice of same," etc., evidently means that the protest and mailing of the notices were concurrent acts done "immediately" after the dishonor, which necessarily means on the day of the dishonor.

3. Where a party affixes his signature to a blank bill without any written conditions he confers an implied authority to fill up the blank with any sum, address or date, and as against innocent holders, or those who had no knowledge of the agreement or equities between the parties at the time the blank was signed or endorsed, he will not be allowed to escape liability by showing his secret instructions have been violated, or his parol authority exceeded.

4. It is not enough for the person sought to be charged upon such an instrument to allege that the holders obtained it by some means unknown to him, or even that they got possession of it fraudulently. He created an agency in the person to whom he delivered it, and in the absence of an averment that his agent did not deliver it to the holders, or that it was surreptitiously obtained or stolen by them in its incomplete state, he is bound.

White & Reeves for appellant.

Bigger & Reid for appellee.

## BOLINGER v. HANSON'S ADM'R.

Filed June 16, 1883. Appeal from Graves Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Final order—An order of court adjudging that a partnership existed between the plaintiff and defendant and referring the case to a commissioner for a settlement of partnership accounts, suggesting the basis of settlement, was not a final order, but merely an expression of opinion of the court, and no appeal could be prosecuted therefrom. Upon appeal from the judgment based upon the commissioner's report the case stands as if the order of reference to the commissioner had not been made, and as if there had been a submission for final judgment on the pleadings, exhibits and testimony.

2. As the pleadings do not state facts showing that a partnership existed the parties should be permitted to reform their pleadings and to present issues which it seems were supposed to have been made.

3. Appellate jurisdiction—Assignment of errors—The appellate jurisdiction over judgments in ordinary actions, whether tried by a jury or by the court, differs from that exercised over equity judgments. In the former it goes no further than to raise specific errors of law designated by the appellant in his assignment, but in the latter it inquires whether the judgment itself is erroneous and undertakes to make it right, searching for the false steps whereby the wrong conclusion was reached. The assignment in an ordinary action that the court erred in rendering the judgment appealed from would present no question whether it conformed to the verdict or was sustained by the pleadings, but such an assignment in an equity case justifies a revision on its merits.

Tice & Smith and E. W. Hines for appellant.

D. G. Park and Hugh Rodman for appellee.

THE

# KENTUCKY LAW REPORTER AND JOURNAL

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Owing to the recent illness of Mr. Brannin several communications remain unattended to which will receive attention during the coming month.

## NOTES OF CASES.

In Day v. Highland Street Railway Co., Massachusetts Supreme Court, May, 1883, it is held that plaintiff can not recover of the company for personal injuries sustained while acting as conductor on one of the company's horse cars, the car being run on Sunday, in violation of the Lord's Day act. Running the car on Sunday in disregard of the law was contributory negligence on his part. So in Bosworth v. Swansey, 10 Met., 363, and Davis v. Somerville, 128 Mass., 594, it is held that a person traveling on the Lord's Day in violation of law can not recover in an action against a city or town for injuries sustained from a defective highway. But the doctrine in New York seems to be opposed to the above. See Platz v. City of Cohoes, 89 N. Y., 219. And see also Opsahl v. Judd, 1 Ky. Law Reporter and Journal, 926, where it is held that the fact that the person injured was a passenger on board a steamboat upon a Sunday excursion is no defense to an action for damages for negligence. That decision, however, rests on the peculiar undertaking between a common carrier and a passenger. Also in Wallace v. Merrimac River Navigation Co., Massachusetts Supreme Court, 28 Albany Law Journal, 155, it is held that where plaintiff was sailing his yacht on Sunday, in violation of the statute, and was negligently run into by defendant, plaintiff can not recover, but if the injury had been caused by the malice of the defendant, although the plaintiff was in violation of the

law forbidding traveling on the Lord's Day, he could recover, his title to an action would be independent of his unlawful act. The injury would be considered as proceeding solely from the wrongful act of defendant.

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The Supreme Court of Iowa has recently held, in Bonnett v. Newmeyer, June, 1883, that the parent may surrender the custody of the infant child so as to estop himself from recovering possession of it. In that case the mother, a widow, had given the child at its birth to the mother's grandparents to raise it. She married again, and being of pecuniary ability and good character, applied for the possession of the child. The defendants were also of good character, and able to provide for the child. The court says the right of parents to the custody of their children is not absolute under all circumstances. The custody being surrendered to another, the affections of the new custodian and the child becoming engaged, a state of things arises which can not be altered without risk to the happiness of the child, and if the father wants to reclaim it the better opinion is that he can not have the assistance of the courts in doing so. His parental right must yield to the feelings, interests and rights of others acquired with his consent. (Clark v. Bayer, 32 Ohio State, 299.) In short, after the parent has surrendered the child, in all subsequent controversies respecting its custody the matter of first importance is the interest and welfare of the child. In a very recent case in Missouri, the matter of Scarritt, 28 Albany Law Journal, 156, the same thing held in effect, although stated differently. There it is said: "If the contest is by a father seeking to regain his child, as he is the natural guardian and entitled to its custody, it will be awarded him unless he is shown to be, for some reason, unfit or incompetent to take charge of the child, or unless the welfare of the child, for some special reason, demands a different disposition." This latter cause seems to embrace the state of things existing in the Iowa case, supra. It has been held in Kentucky also, in Ellis v. Jessup and Wife, 11 Bush, 403, that where a father has surrendered his infant child to a third per-

son to be maintained and educated, and that person properly performs those duties, the authority of the father over the child ceases, and passes to the person standing in local parent is.

In Heiman v. Western Union Telegraph Co., Wisconsin Supreme Court, May 1883, plaintiff sent a telegram over defendant's line upon the condition, inter alia, that "no claim for damages shall be valid unless presented in writing within 20 days from the sending of the message." The message was delayed, but plaintiff did not make his demand for damages within the 20 days, and now claims that the above condition was not binding. But the court holds that it is. See also Wolf v. Western Union Telegraph Co., 62 Penn. State, 83; Young v. Western Union Telegraph Co., 65 N. Y., 163, where the decision is put on the ground that the multitude of messages transmitted requires a speedy knowledge of claims to enable the company to keep an account of its transactions before, by reason of their great number, they cease to be within their recollection and control. (Lewis v. Great W. R. Co., 5 Hurl. & N., 867.) In Camp v. Western Union Telegraph Co., 1 Met. (Ky.) 167, it is held that the condition exempting the company from liability for mistakes unless the message was repeated was a valid condition. But in that case no negligence was proved against the company, a mistake in the wording of the telegram was all that was shown.

In Dougherty v. Sparkle, North Carolina Supreme Court, February, 1883, it is held that an action against a married woman upon her promise to pay for work done on premises owned and held as her separate estate is not cognizable in the court of a justice of the peace. Such court is a common law court, and its jurisdiction does not embrace causes of an equitable nature. Equity alone recognizes such a contract, and though it does not enforce the undertaking against her by a judgment in personam, yet it will proceed in rem against her separate estate. It is not the woman, as a woman, who becomes the debtor, but her engagement has made her property, which is settled to her separate use, a debtor, and liable to satisfy the undertaking.

## KENTUCKY COURT OF APPEALS.

### CARLISLE v. JUMPER, &c.

(Filed Sept. 11, 1883—Not to be reported.)

1. Equities—Priorities—Where A undertakes to mortgage a tract of land to which he has no title, except that he holds a lien on it for unpaid purchase money, the undertaking constitutes an equitable assignment of the lien. When there are several such assignments they are to be satisfied according to priority.

2. A junior equity, by recording the assignment to himself, does not thereby unite the legal title with his equity so as to prevail over his senior who has not recorded his assignment. Such assignments are not recordable instruments.

3. Mortgage pro rating among several notes—Where several notes are secured by the same mortgage or lien, each note carries with it, as an incident, its proportion of the sale of the mortgaged property. The assignee of one of the notes does not acquire the entire security, but only his share of it.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

In September, 1865, J. C. Beyland conveyed to H. M. Sewell a tract of land in the county of Campbell, in consideration of two notes on one Ogden that were transferred by Sewell to Beyland. The notes were not paid at maturity, and Beyland instituted an action in equity to enforce his lien on the land. The parties stated the issue as to whether any lien was retained to secure the payment of the two notes, and that litigation resulted in a judgment selling the land to satisfy the lien. During the progress of that action the notes or claims of Beyland were sold to John G. Carlisle, and the latter authorized to prosecute the action in his, Carlisle's, name.

Beyland, by a subsequent arrangement with Carlisle, again became the owner of the claim against Sewell, and in consideration of the retransfer by Carlisle executed to him his three several notes, amounting in the aggregate to about thirty-five hundred dollars. When these notes were executed to Carlisle, Beyland, for the purpose of securing their payment, executed and delivered to Carlisle a writing by which he gave to him a lien on the claims he was prosecuting against Sewell, and binding himself, in the event he was successful, to execute to him a mortgage on the land. After this transaction the appellant, John G. Carlisle, became the owner of the notes on Beyland, and the lien given to secure their payment.

The transaction between John G. Carlisle and Beyland, giving to the former a lien on the Sewell claim, took place in October, 1866.

After the assignment to Carlisle Beyland made other assignments to Ficklin and Metz, and also undertook to mortgage the land he had already conveyed to Sewell to Constans and Jumper. This controversy arises between the several creditors to whom the claim had been assigned as to the priority, if any, in the distribution of the fund created by the sale of Sewell's land.

The chancellor below, in the distribution, placed Carlisle on an equal footing with the other creditors, and he is complaining, insisting that he has the superior equity and his claim should be paid in full.

The mortgagees from Beyland acquired no lien as against creditors or purchasers by reason of their mortgages, as there was no title in Beyland. He had already conveyed to Sewell, and the only claim that Beyland had was the lien retained in the conveyance to secure the purchase money. The mortgages executed to the several creditors can only be construed as equitable assignments of the lien, and there is no law authorizing the contracts of assignment made between any of these parties to be recorded, and, therefore, the fact that some of the transfers were entered of record can give no preference to the creditors, or operate as a notice to the purchasers.

This, it seems to us, is purely a contest between equities, and the senior equity must prevail. Where the junior equity without notice of the older equity acquires the legal title, the senior equity must yield, but in the absence of the legal title the senior equity will have the preference, and as said by this court in Hewitt, &c. Sturdevant, 4 B. Monroe, 453; "the senior may as well complain of a want of notice of the junior, as the junior can complain of a want of notice of the senior." The question of notice does not arise in this case, and the assignees of the several equities, it is contended, took them subject to all the equities attached to the claim while in the hands of the assignor.

Beyland could not have asserted his claim to a lien superior or equal to that transferred to Carlisle, and, therefore, he could not, by assigning it to others, give to them a greater right

than he himself had. Beyland had executed to Carlisle his individual notes for this money, and to secure the payment had, by the written agreement, given him a lien on the entire claim, or so much of it as would pay his debt. This contract was binding between the two, and a subsequent transfer securing other debts must be held subordinate in the distribution of the fund to Carlisle's claim. They acquired no greater right as against Carlisle to this fund than the original assignee, Beyland, had. "Priority in time gives the advantage in right in" a case like this.

The chancellor below regarded the case as analogous to the assignment of several notes executed for the purchase money of land, or secured by the same mortgage. Where several notes are secured by the same mortgage, each note carries with it as an incident its proportion of the sale of the mortgaged property. A party to whom one of the notes is assigned does not acquire the entire mortgage security, because the other notes are of the same dignity and retain the same lien, and he only takes by the assignment so much of the security as belongs to his share of the lien—the equities of all the holders of the lien notes being equal.

In this case appellant purchased no claim against Ogden, nor had Ogden or Sewell given him any lien. Beyland was prosecuting his claim to enforce the lien, and when executing his individual note to Carlisle in order to indemnify him transferred to him the claim on Sewell, or agreed that he should have a lien to satisfy the note. If, therefore, Beyland, by this agreement, postponed his right to that of Carlisle, then a subsequent assignee from Beyland is in no better condition.

We think it manifest that Beyland, the assignor, could have aserted no claim to the fund until Carlisle was satisfied, and this being the case, the court erred in not giving to Carlisle, who had the senior equity, preference over the other creditors in the distribution.

Judgment reversed and cause remanded, with directions to enter a judgment in accordance with this opinion.

J. G. Carlisle for appellant.

J. F. & C. H. Fisk aand F. M. Webster for appellees.

## HUSBANDS, &c. v. CITY OF PADUCAH.

(Filed May 17, 1883—Not to be reported.)

1. Taxes—Where real estate in a city is by the charter made liable "for taxes assessed against it or the owner," a lot which is sufficiently described in the assessment is liable, although the assessment is not made against the owner of the legal title.

2. Tax levy—Where the charter requires levies for taxes to be first made on personalty, a sale of the realty first is not void, although it appeared that the owner had personalty.

3. Lien—A lien for purchase money is not superior to that for taxes, although the former existed prior to the passage of the tax law.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hines.

This is a proceeding to subject a house and lot in the city of Paducah for the payment of taxes assessed against that property for the years 1878 and 1874. The record shows that the property was sold by L. D. Husbands to J. B. Husbands in 1867, for the sum of six thousand dollars, none of which has been paid; that L. D. Husbands executed to J. B. Husbands a title bond, and that J. B. Husbands has, since that time, continuously occupied said property.

It is claimed, first, that the assessment and levy is void because the property was assessed in the name of "J. B. Husbands for wife," while the legal title was in L. D. Husbands and the equitable title in J. B. Husbands.

To this it is sufficient to say that the 5th section of the act of the legislature passed at the December session, 1877, amendatory of the charter of the city, provides that real estate shall be liable for taxes assessed against it or against the owner thereof, and that the taxes sought to be enforced are assessed in substantial compliance with the charter against the specified property sought to be subjected. The fact that its is entered upon the assessor's books as the property of the wife, when it is in fact, the property of the husband, is merely an irregularity that does not affect the assessment and the liability of the property therefor, since it appears that the property described in the assessor's return is the property against which the tax was intended to be assessed. This is an answer to the second error assigned, that is, that the collector in the levy and sale

did not follow the assessment. If this return of the assessor shows substantially an assessment against the property instead of against the owner, the identification of the land in levy and sale answers the requirements of the statute.

It is objected, in the third place, that there should be a reversal because the charter provides that levies for taxes shall be first made on personal property, then on the real property of the assessed; and as the record shows that J. B. Husbands had sufficient personal property to satisfy the demand, the levy and sale of the realty was void. There are two reasons why this position is not tenable: First, the fifth section of the act of December term, 1877, quoted, provides that real estate against which an assessment is made is liable to be subjected to the payment of the tax; and, secondly, as the collector has under the charter the same rights, powers and duties in the collection of taxes as a sheriff, the levy and sale is not void on account of such irregularities, as has been frequently held in the cases of sheriffs making such levies and sales.

The objection of appellant, L. D. Husbands, to the effect that as his lien for purchase money is anterior to the liability for the taxes claimed and to the act authorizing the method of collection, his claim is superior, is not tenable, because of the reciprocity between taxation of property and the protection extended by the government.

Judgment affirmed.

L. D. Husbands for appellant.

P. D. Yeiser for appellee.

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## JOHNSON'S ADM'R v. HUNT.

(Filed September 20, 1883.)

**1. Pleading accord and satisfaction—A plea of accord and satisfaction must allege that plaintiff accepted the services in satisfaction of the debt or claim against the defendant. An allegation that he agreed so to accept them is insufficient.**

**2. Marriage brokage contract—An undertaking by one, for a moneyed or valuable consideration, to bring about a marriage between others is void.**

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, George W. Hunt, on the 1st day of January, in the year 1877, borrowed of his grandfather, Thomas Johnson, the sum of five thousand dollars, for which he executed his note payable in three years, with eight per cent. interest from the time of its execution.

The grandfather died, and his personal representative instituted an action at law upon the note, to which the appellee pleaded, in substance, that decedent being a widower and desirous of again marrying, had offered a relative the sum of ten thousand dollars to aid him in procuring him a wife, and his relatives (except the appellee) opposing a second marriage, the grandfather, in consideraton that the appellee would assist him in procuring a wife, agreed that he would, as a compnsation therefor, release and give up to the appellee the note in controversy.

The name of the young lady having been suggested, the appellee alleges that he wrote letters to her for his grandfather, and did all in his power to accomplish the purpose in view; that he had not only complied with his contract, but used his influence with others to marry his aged relative. He therefore asks that the note be delivered up. To this answer a demurrer was filed and susatained, and thereupon the appellee filed an amended answer in which he alleges that his grandfather was seventy-seven years of age, feeble and unable to ride on horseback, and that in consideration that he, the appellee, would write letters to the young lady for him, and see that they were delivered, that he would give him the note for five thousand dollars; that he fully complied with the agreement by writing the letters and delivering them to the young lady, and, therefore, the note was fully discharged The demurrer to the answer as amended was overruled, and the case went to the jury upon an issue made by the administrator as to the existence of any such agreement, and a verdict returned for the defendant.

The answer is but a plea of accord and satisfaction, and to make such a plea good it should be alleged that the services performed were accepted in satisfaction of the debt or claim against the defendant, and to allege that the party agreed to accept them in satisfaction is bad pleading. Where the accord is to do a thing in satisfaction at a future day, and the act is

done and accepted on that day it is in law a satisfaction, and no action can be maintained on the original demand.

The plea must allege that the matter was accepted in satisfaction. (Hearn v. Keihl, 38 Penn., 147 Chitty on Contracts, section 1123.) If the intestate agreed to accept the services of appellee in sdischarge of the note, and failed to comply with his agreement, and the contract is otherwise unobjectionable, the remedy is by an action for the breach of the contract. The most fatal objection to the defense is that the contract alleged is void, and the proof in no manner aids the pleading, or verdict rendered. It is alleged that the grandfather was advanced in years, too feeble to ride and unable to write, and that the appellee (his grandson) undertook to write his letters to the young lady, and deliver them, and the young lady says those letters had reference to a matrimonial alliance with the old gentleman.

The principal witness for the appellee states that in a conversation with the old man the latter said he had agreed to give the grandson the note if he would assist him in marrying; that Hunt was to do his writing, etc., and was complying with his agreement. The same statement is made by other witnesses, who speak of conversations with the old man in which he spoke of his matrimonial prospects, and of the appellee as the instrument through which success was to be accomplished. He said to a lady witness that George was complying with his contract like a Turk. The defense made, as well as the testimony in support of it, shows clearv (if any contract was made) a marriage brokerage agreement, the young man undertaking to bring about the marriage in consideration of the surrender of the note for five thousand dollars. The inference by one upon an agreement to receive a monied or valuable consideration to induce or bring about a marriage between others has always been held void. Such contracts, if carried out, result in unhappy marital relations, and have been discountenanced by the law. The elementary authorities, as well as the reported cases, all sustain this view of such a contract.

We have seldom seen a more flimsy defense than has been made in this case. The declarations of an old, feeble and diseased man with reference to a contemplated marriage are made the sole foundation for defeating the recovery. The appellee promised to pay the note time and again after the death of his

grandfather, and there can be no doubt, from the proof in the record, that the statements made by the intestate were mere expressions of an intention to give without any consideration whatever. He died in possession of the note, and it passed into the hands of the administrators. The court below should have sustained the demurrer to the answer as amended, and, failing to do that, should have instructed the jury to find for the plaintiff. (Smith on Contracts, 221; Cole v. Gibson, 1 Vesey, 503 ; Drury v. Hook, 1 Vernon, 412; Fonblanque's Equity, 212.)

The judgment is reversed and cause remanded, with directions to award a new trial and to sustain the demurrer to the defense made, and for further proceedings consistent with this opinion.

Wrighth & McElroy, Rodes & Settle, Wilkins & Sims and E. W. Hines for appellant.

Porter & Porter for appellee.

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## JOHNSON v. COMMONWEALTH.

(Filed September 22, 1883.)

**Evidence—Upon a trial for murder, the corpus delicti need not be established in every case by direct proof of the killing or by inspection of the body itself; circumstantial evidence is admissible for this purpose.**

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hines.

Appellant was convicted and sentenced to the penitentiary for life on the charge of murdering his child. The evidence is entirely circumstantial. Appellant left his father's house having in his arms his two children, aged respectively three years and one year, with the avowed intention of going to Shakertown.

He did not go in the direction of Shakertown, nor is there any evidence that he went there, but on his return to his father's, some three or four days after he had left, having with him only the elder of the two children, and being asked about the younger replied that he left it with a certain widow woman near Shakertown. A brother of the appellant went to the house of the woman with whom appellant stated he had left

the child, and ascertained that the child had not been left there. After these inquiries had been made and the suspicion becoming general that the child had been murdered, appellant stated to a member of his father's family. that he was going to Shakertown and get the child, but instead of doing so he went in another direction, under an assumed name, and when arrested denied his identity, and when told that he was charged with murdering his child, said: "They may try me and send me to the penitentiary, but they can not hang me unless they prove the child is dead."

The only question presented is whether the corpus delicti, the fact that the crime of murder has been perpetrated, must be established by direct proof of killing, or by an inspection of the body; or whether the death may not be established by circumstantial evidence, as any other fact in the case is established. We think there can be no doubt that circumstantial evidence is competent to establish the fact that the person charged to have been murdered is dead. The production of the body is certainly the most conclusive, if not the best, evidence of that fact, but in the very nature of crimes this is not always possible. He who meditates and perpetrates crimes courts secrecy that punishment may not follow, hence the necessity that circumstantial evidence should be admitted to establish the fact of death as of any other fact necesary to the development of truth. It is true that experience illustrates the danger of convictions for murder when the body of the person charged to have been murdered is not produced or acounted for, but a like danger arises when circumstantial evidence is admitted to establish the identity of the person who did the killing. It may be that the danger of an erroneous conviction would be greater in the first instance than in the last, but that can not affect the question of the competency of such evidence in such cases.

Under our system, where the jury are the tryers of the facts, the weight to be given to testimony is for the jury alone, the court being concerned only in seeing that improper testimony does not go to the jury, and that they are properly instructed in the law. Where there is evidence, competent in its nature tending to justify the conclusion at which the jury arrives, this court can not disturb the verdict unless the jury have not been properly instructed as to the law of the case.

The competence of circumstantial evidence to establish the fact of death is authorized universally, and under our Code its conclusiveness is for the jury, and not for the determination of the court. (1 Bishop on Criminal Procedure, section 1057; Commonwealth v. Webster, 5 Cush., 310; Stacking v. State, 7 Ind., 330; State v. Keeler, 28 Iowa, 553; Wills on Circumstantial Evidence, section 3, page 162.)

Judgment affirmed.

Edwards & Hazelipp for appellant.

P. W. Hardin for appellee.

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## NICKOLS v. SENNETT, &c.

(Filed April 14, 1883.)

**The Kentucky exemption statute (General Statutes, chapter 38, article 13, section 9) does not require that all of the exempted land shall be in the same parcel or body, nor that the dwelling house shall be located on it; the statute embraces such land adjoining the parcel on which the dwelling stands as is capable of continuous and necessary use as part of the homestead by the reasonable exertions of the claimant, provided all the land and dwelling do not exceed $1,000 in value.**

Appeal from Greenup Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellant is a bona fide housekeeper with a family, residing in a house situated on a parcel of 9 or 10 acres of land, and the owner of 15 or 20 acres adjacent thereto, but 32 poles and 9 feet from it. He occupies and uses both parcels as his homestead. The court below held that the 15 or 20 acre parcel was subject to sale under execution because of its isolation from the other parcel.

From that judgment this appeal is prosecuted.

The statute exempts "so much land, including the dwelling house and appurtenances, owned by the debtor, as shall not exceed in value one thousand dollars.

"This language does not require that the land shall be in the same parcel or body, nor does it declare that the dwelling house shall be located on the land to be exempted, but it provides that the dwelling and appurtenances shall be owned by the debtor, and included in the exemption.

We know of no reason which would authorize such a construction of the statute as would deprive a bona fide house-

keeper of his homestead in any land adjoining or adjacent to the parcel on which the dwelling may be situated, provided all the land, including the dwelling house and appurtenances, do not exceed one thousand dollars in value, and the land is capable of continuous and necessary use as part of the homestead by the reasonable exertions of the homestead claimant.

Such seems to be the tendency of the cases of Franks v. Lucas, 14 Bush, 395; Miles v. Hale, 12 Bush, 105, in which separate but adjacent parcels of land were held to be exempt.

In the case before us both parcels are necessary to the appellant's use as a homestead; they are separated by a small strip of land owned by his mother. He can continuously and conveniently use each parcel for the support of his family, without being compelled to rent out the 15 or 20 acres, and as they are not worth exceeding $400, we are of the opinion that both parcels legally enter into the composition of the homestead.

Wherefore the judgment is reversed and cause remanded, with directions to render judgment in conformity to the principles of this opinion.

Thos. H. Paynter for appellant.

E. F. Dulin for appellee.

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## CUMMINGS v. COMMONWEALTH.

(Filed June 14, 1888.)

1. Larceny—C. having agreed to sell a sow and pigs to S., pointed out as his a sow and pigs that belonged to F. S. paid C. for them and drove them off. Held—That C. could be indicted for larceny for hog stealing under the statute. He was guilty of the act of felonious taking through S. as his instrument.

2. Presumption as to the record—Where the record fails to show whether the motion for a new trial was acted on, it must be presumed that the court acted legally and disposed of the motion before rendering judgment.

3. Bill of exceptions—Where bill of exceptions is uncontroverted, its statements are presumably true, though whether the judge had the right to introduce them into the bill is a question of law.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellant, Cummins, according to the evidence, told Sweet that he wished to sell him a sow and pigs, and after agree-

ment on the price went to where a sow and pigs were lying down on the commons, and pointed them out as his, and Sweet paid him $7 in money for them and them drove them off.

The sow and pigs belonged to John Flauher, who lived near by.

The appellant seems to have been out of money, and resorted to this means of obtaining some to supply his wants, and the proceeded to the fair.

Having been convicted of the offense of larceny, or hog stealing, under the statute, the appellant has appealed, and his counsel contend that his offense was not larceny because there was no asportation by him, but it was obtaining money by false pretenses, if anything.

He was not indicted for obtaining the $7 for the sow and pigs, but for stealing the sow and pigs. Whether his acts constituted both offenses of larceny of the hogs and obtaining money by false pretenses, for which he might be punished, need not be determined, as there has been no attempt to try him twice for the same acts.

The owner of the sow and pigs never parted with the possession or the property in them. The asportation was by the hand or physical act of Sweet, but the act of felonious taking was that of the appellant, committed through Sweet, who was his instrument in committing the trespass upon the property of Flauher.

East, Hale and Hawkins, who are approved of by Archbold, say that if the taking be by the hand of another it is the same as if by the hand of the thief himself. For instance, if the thief procure a child within the age of discretion, or an idiot, to steal goods for him, such taking must be charged to him.

It is also a well-established rule if by artifice or fraud of the thief intending to steal goods the owner is induced to part with their possession merely, and does not part with the title, that this is such a taking as will sustain the charge.

It seems, therefore, that instead of fraudulently procuring the owner to part with the possession the appellant sold the sow and pigs and caused her removal by Sweet, who was innocent, in the trick of placing the asportation on him, and it should be treated as his act through the innocent agency of Sweet, and should be charged to him.

The record fails to show whether the motion for a new trial was acted on or not at the term when appellant was tried, and found guilty by the verdict, but it does show that the court, after the lapse of several days ensuing the verdict, rendered judgment on the verdict. And it is certified in the bill of exceptions that by oversight the clerk failed to enter the order overruling the motion for a new trial before the judgment was rendered. If the record had shown affirmatively that the motion for a new trial had not been acted on, then it could not have been varied, vacated, modified, made or amended at a subsequent term, except in a direct proceeding for that purpose. But the presumption being that the court acted legally, in the absence of facts showing the contrary, we can not conclude that the court did not overrule the motion for a new trial in the absence of all record evidence on the subject, but must presume that the court did overrule the motion, and it had the right to have the order entered nunc pro tunc at the next term when the appellant presented his motion for a new trial to the court for its judgment and disposition.

The order overruling the motion was entered upon the order book at that term, but the judge certifies in the bill of exceptions that it was overruled during the previous term, and before the judgment, but by oversight of the clerk was not entered. No effort was made to controvert the bill of exceptions as certified by the judge, and no other bill was attempted to be made, hence the statement in the bill of exceptions must be considered as true, whether the judge had the right to make it show, such matter being a question of law.

Had the appellant's demand to have his motion for a new trial acted on at the second term of the court prevailed it would have been followed by another judgment, because the first judgment would have been shown to be void, and no obstacle to a second, and he alone would have been injured. As it is, the court gave him the benefit of the time he had served, and thus rendered the remainder of his servitude shorter, and instead of prejudicing, protected his substantial rights. The judgment is, therefore, affirmed.

Thos. R. Phister for appellant.

P. W. Hardin for appellee.

## HANEY v. COMMONWEALTH.

(Filed June 12, 1883—Not to be reported.

1. Self-defense—The jury should be instructed that the right of self-defense does not depend upon the real or apparent danger as it appears to them, but on the danger as it appeared to the accused at the time he did the killing. (Munday v. Commonwealth, 2 Ky. Law Rep. & J., 67.)

2. Dying Declarations—The general rule is that declarations of the deceased are admissible only when they relate to facts and not to mere matters of opinion; but to this rule there is an exception, and declarations of the mere opinion of deceased are admissible where they are favorable to the accused and explain the conduct or motives of deceased.

Appeal from Lyon Cicruit Court.

Opinion of the court by Chief Justice Hargis.

The appellant, John Haney, having been convicted and sentenced to the penitentiary for life upon the charge of murder, has appealed to this court, and seeks a reversal, first, because the circuit court misinstructed the jury; second, because the dying declarations of Albert Gracey were excluded from the jury.

The instructions were too numerous, and should not have recited on their face at whose instance they were given, but taken as a whole we see no error of law in them except they fail to tell the jury that the right of self-defense depended upon the real or apparent danger as it reasonably appeared to the accused as he was then situated, and in effect told the jury if they believed, as matter of fact, there was other real or apparent means of escape than to kill the deceased, then it was his duty to instruct them to adopt such means of escape. It was calculated to confuse the jury, as was done in number five, relative to the effect of threats alone, although the fact of the deadly assault by the deceased with the brick was recited in a subsequent instruction. If any recitation of the threat, assault and character of deceased for violence should have been made in any of the instructions it ought to have been done in the eighth instruction, wherein the jury were attempted to be informed as to the state of case which would authorize the accused to stand his ground and use force before he was actually assaulted.

The evidence of the attending physician and others showed that the deceased was in extremis, and knew it, when he declared that "he brought it all on himself; he did not blame John Haney for shooting him; he alone was to blame. I did not think the negro would kill me; I brought it all about myself; I was to blame for the whole thing."

Whether these declarations were admissible in appellant's favor is the question, on this part of the case, presented by his counsel.

The deceased had, a few hours before he was shot, stealthily committed a deadly assault upon the appellant with a brickbat, and swore he intended to kill him, and a few seconds before the shooting was seen approaching the appellant, cursing him and once stooping down as if to pick up something.

The witness who saw him thus approaching the appellant was a woman. She fled, and in a few seconds heard the shots. No eyewitness was present and saw the fatal shot fired, but two witnesses were near and saw the retreat of the deceased and pursuit by appellant, who was shooting at him.

Greenleaf, section 159, lays down the general rule in this language:

"The declarations of the deceased are admissible only as to those things to which he would have been competent to testify if sworn in the cause. They must, therefore, in general, speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue. But the right to offer them in evidence is not restricted to the side of the prosecution; they are equally admissible in favor of the party charged with the death."

In the case of Rex v. Scaife, 1 Moody & Robinson, 551, Coleridge, J., received as evidence the following dying declaration, viz: "I don't think he would have struck me if I had not provoked him," observing, when he admitted it, that it might have an influence on the amount of punishment. This declaration was clearly the opinion of the declarant. It was held in the case of Wrae v. State, 20 Ohio State, 460, that a declaration that the wound inflicted upon the declarant was done without any provocation on his part was competent, because it related to fact and not opinion.

The cases of U. S. v. Taylor, 4 Cranch, C. C., 338, and Moore v. State, 12 Ala., 764, support the doctrine of Rex v. Scaife, above. Upon consideration of the authorities and the reasons for the general rule, which, in the first instance, is based on necessity, we conclude that where the declaration is offered against the accused to convict him it should be confined to facts, and not allowed to extend to mere matters of opinion, but in a case like the present, where the declaration is offered by the accused, it should be admitted from necessity, and because of that tender regard which the law pays to life and liberty, and for the reason that the deceased is so likely to be telling the truth when he solemnly, in the hour and article of death, declares himself to have been alone blamable, and his slayer excusable.

Such declarations are not merely opinion, they were uttered by a participant, whose opportunity for knowing whether he was to blame was greater than that of any one else, and explain the intent and motive with which he was actuated in the part he played, and exhibit those internal facts, constituted of feeling, motive and judgment, which will greatly assist the jury in understanding the true nature and object of his acts as proven by other witnesses.

To the general rule excluding matters of opinion or belief an exception should be made, allowing the declarations of the deceased in behalf of the accused where they will explain the acts and conduct of the deceased, or show his feelings or motives, intent or belief, when they are essential to qualify or aggravate his conduct. These are facts which, were he living, he could be compelled to testify to as a witness, and while they are generally treated, because of the mode of expression used, as utterances of opinion or belief, they are essential and orignal facts which go far to illustrate the motives, and give meaning to the acts of the declarant, who speaks, in such instances, of his own acts, whose scope and effect he understands, and not those of the accused alone. The admission of such declarations can do no harm. Frauds can not be practiced under cover of the rule. And there is not so much danger of misconception or perjury as where the declarant speaks from hostile feelings, surrounded by sympathizing friends, ready to construe his

words as favorable to their own views as may reasonably be done.

We are, therefore, of the opinion that the declarations of the deceased which we have quoted were competent evidence, and should have been admitted.

The judgment is reversed and cause remanded, with directions to grant appellant a new trial.

F. A. Wilson and R. W. Wake for appellant.

P. W. Hardin for appellee.

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## SANFORD v. LOWENTHALL, &c.

(Filed October 28, 1880.)

**1. Collateral security—Due diligence—One who holds notes or claims as collateral security is required to use only ordinary diligence and good faith in collecting them. Having obtained judgment in a justice's court, issued execution and had it returned "no property," he is not bound to proceed on the judgment in the circuit court. Nor is the case altered by his express undertaking to use "due diligence" in collecting the claims.**

**2. Demurrer—A general demurrer to the whole of the answer is not well taken if any portion of the answer presents a good defense. But a general demurrer in terms "to each of the paragraphs of the answer" is well taken, if any one paragraph is insufficient.**

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hines.

Appellant complains that the court sustained a demurrer to the second and third paragraphs of his answer, and that the court did not, on the demurrer to the answer, consider the petition and declare it defective. The defect claimed to exist in the petition is that it fails to show that appellee used proper diligence in attempting to collect the claims placed in his hands as collateral security, in that, as to a portion of the claims, judgment was obtained in a justice's court, and an execution from that court returned "no property." It is insisted that the judgment and execution should have been filed in the office of the circuit court, and an execution issued therefrom. Such a course might be necessary to establish legal insolvency, but no such diligence is required of one who holds paper or claims as collateral security. He is required only to use ordi-

nary diligence, and to exercise good faith in his attempt to collect. This is an elementary principle, and requires no citation of authority to support it. To obtain judgment in a court having jurisdiction of the person and of the subject-matter in controversy, and to have execution issued from that court and returned no property, is in itself sufficient evidence of ordinary diligence, which is all that is required in such cases as this. It does not alter the case that the receipt for the claims held as collateral stipulates that appellee is to use "due diligence" in collecting. Such a stipulation neither enlarges nor narrows the liability incidentally attaching to such a contract.

It is also insisted that the court erred in sustaining the demurrer to the second and third paragraphs of the answer, first, because of the form of the demurrer; and, second, because each of the paragraphs constitutes a defense to the action. The demurrer was: Plaintiff demurs to each of the paragraphs of the answer. It is insisted that this is not a special demurrer, such as is provided for by section 92 of the Civil Code. This is undoubtedly correct, as it specifies none of the grounds for a special demurrer. It is also insisted that it is not authorized by section 113, which provides that a party may demur to a part of pleading and present an issue of fact as to another part. It is true that if the demurrer was in terms to the whole of the answer, on the ground that it did not state any defense to the action, it would not be well taken if any portion of the answer presented a defense, but it is also true that if the demurrer designated specifically the second and third paragraphs as defective because they did not state a defense to the action, it would be technically good, and it would be in derogation of the liberal spirit of the Code to hold that the demurrer could not be considered because it was to each of the paragraphs, when any two out of the three were bad. The second paragraph of the answer admits that judgment was obtained on the Harp debt, and execution returned "no property," except as to a certain quantity of tobacco, which sold for $5,117. The fact that appellant would have levied the whole amount of the debt for the tobacco if he had known of the sale does not affect the question.

No fraud or want of diligence is charged against appellee on account of his failure to notify appellant of the time of the sale.

Appellee was required to do no more than to obtain judgment and cause execution to issue. The additional allegation in that paragraph that the defendant had, and owned at the time, a certain tract of land subject to execution is immaterial. Appellee was not required to make personal search for property to satisfy the debt. In the absence of any fraud or knowledge on his part he had a right to trust to the capacity and viglance of the officer to subject any legal estate the debtor might have.

The third paragraph was not good for the reason started in the first part of this opinion. Appellee obtained judgment on the claims then mentioned in a justice's court, and had executions issued which were returned "no property." If appellee could, under any circumstances, be required to have execution issued from the clerk's office of the circuit court on these judgments, it is not certainly required of him when it is not made to appear that anything could have been thus reached to satisfy the debts.

Judgment affirmed.

Judge Hines delivered the following response to the petition for a rehearing:

In the petition for a rehearing it is said: "The error in the first is, we think, in assuming that the assigned notes were taken as collaterals."

The petition as amended alleges that the notes were received as collateral security; that plaintiffs were to account for any excess they might collect over and above the debt held by them, and that they would not bring any other suit on the notes executed by defendant to plaintiffs before July, 1879, the plaintiffs to use due diligence in the collection, and that defendant was to pay 1 per cent. for collection.

These allegations are not denied in the answer.

That this was not a payment pro tanto is too clear to admit of discussion, and that the claims assigned were as collateral is equally clear. (Lee v. Snead, 1 Met., 628; May v. Quinby, &c., 3 Bush, 103.)

The case of Green v. Cummins, 14 Bush, 175, has no application whatever, because the assignee of the notes in that case took them in part payment, and not as collateral security.

What was said in the opinion in reference to the Harp debt was based upon the supposition that it was referred to in the second paragraph of the answer. In this we were misled by the record. We find on close examination that it is in the first paragraph, and not reached by the judgment sustaining the demurrer. This, however, does not affect the conclusion that the judgment of the court below is correct.

Petition for rehearing overruled.

Nichols & Hawes for appellant.

W. M. Smith for appellee.

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## DWELLY v. GALBRAITH, &c.

(Filed April 14, 1883.)

1. Homestead—The exemption statute of Kentucky (General Statutes, chapter 38, article 13, sections 9 and 16) embraces land derived by descent.

2. Upon such land the heir has a reasonable time, after death of the ancestor, to enter and claim homestead, and until such time has elapsed the land can not be levied on and sold, not even for a debt existing at the time it was inherited, but the improvements erected by the heir are liable for his prior debts.

Appeal from Robertson Chancery Court.

Opinion of the court by Chief Justice Hargis.

The appellant, Perry Dwelly, inherited an undivided interest in ten acres of land from his father. After his father's death the appellee caused an execution, which he sued out against appellant, to be levied on that undivided interest, but before the sale was made the appellant erected improvements on ten acres, which his brothers and sisters consented, and the appellee recognized to be his proper part, and moved on it with his family, and on the day of sale claimed it as his homestead.

The court adjudged against his claim to homestead, and the appellant has appealed.

In the case of Jewell v. Clark's Ex'or, 78 Ky., 398, this court held that Jewell, who was a bona fide housekeeper, and resided on his father's land before the latter's death, and was afterwards allotted the same land upon which he continued to reside, was entitled to homestead on the ground that the statute, which excluded from its benefits those whose debt or liability existed prior to the purchase of the land, or the erection of the improvements theron, does not deny exemption if the title be derived by descent and not by purchase.

In the case before us the title was derived by descent, and the appellant was entitled to a reasonable time, depending upon the circumstances, to enter and erect improvements on his share, so as to make it fit to occupy as a homestead, until he neglects a reasonable opportunity to enter he should not be deprived of his right to make a homestead out of his patrimony, over which he has no control till his father's death. This position is supported by the analogous doctrine that allows time to sell one homestead and remove to another.

We are, however, of the opinion that the spirit and purpose of the statutory exclusions from its benefits would be violated if the appellant were allowed to hold free from his prior debts or liability the improvements erected by him after contracting them. There may be some difficulty in subjecting the improvements, but no more than where a debtor, to avoid payments of his debts, consumes his means by erecting improvements on his wife's land. We can see no reason that does not apply equally to the subjection of improvements erected after the creation of the debt or liability, whatever may be the source of the title to the land on which they may be erected.

This is justice, and certainly within the spirit of the statute whose object "was to prevent debtors from purchasing homesteads after creating debts or liabilities, and then claiming the exemption against such debts," or erecting improvements on their lands after creating debts, perhaps to purchase the very material with which the improvements are made, or by reason of which he is enabled to erect them, and then claim their exemption. There is no merit or honesty in any such conduct, and we can not believe the legislature intended to exempt homesteads or improvements purchased or erected by such methods.

Wherefore the judgment is reversed and cause remanded for further proceedings consisent with this opinion, with leave to either party to amend their pleadings, which, if done within a reasonable time, so as to authorize the relief, the improvements and land on which they are erected should be rented out until appellee's debts shall be paid, or by consent of appellant the land and improvements may be sold, and the value of the land paid to him, and that of the improvements to the appellee, not exceeding the amount of the execution.

Winfield Buckler for appellant.

# TITHERINGTON v. HODGE, &c.

(Filed September 22, 1883.)

1. Receivers—One who holds two estates in his hands as receiver can not buy a claim held by one of the estates against the other. Such a purchase enures to the benefit of the parties interested and, is voidable at their election.

2. Surety—The surety on the bond of a receiver is not liable for a fraudulent act committed by the receiver before the surety executed the bond.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Pryor.

Jenkins died insolvent, and his estate, or a part of it, was committed to the hands of the appellee, Hodge, as special commissioner, for the purpose of selling the property, and holding the proceeds for distribution between creditors. Titherington, being a creditor, filed his claim against the estate, and insisted that he was entitled to priority, his lien growing out of certain partnership transactions between himself and the decedent, Jenkins. The case was on the docket for many years, and before its termination Titherington died, and his estate went also to the commissioner, Hodge.

James Titherington was the administrator of this estate, and Hodge the commissioner or receiver of both estates.

The administrator of Titherington, being pressed by the creditors of the estate for payment, and the case lingering on the docket for years, finally sold the claim of his decedent against Jenkins' estate to Hodge, the commissioner, for $600, or about that sum, and not long after this the claim of Titherington against Jenkins was allowed as a preferred claim, amounting to largely over $3,000. So we find the commissioner in the one case, who was the special receiver or commissioner in the other, obtaining this sum of money for $600. The defense, or the substance of it, is that the Jenkins suit had been pending for neary twenty years, and the administrator of Titherington becoming disheartened at the prospects of a recovery, sold his claim, against the advice of counsel, for this small sum.

It is evident from this record that there was money enough in the hands of Hodge at the time this transfer and sale were made to pay Titherington as much as $600, and if Titherington and the commissioner were both in ignorance as to the

condition of the estate it was at least an unconscientious bargain. Nor will we stop to inquire whether or not there was actul fraud practiced by Hodge on the adminisrator of Titherington, as there is a rule of equity applicable to the facts involved in this case that will preclude the appellee, Hodge, from holding on to this money. It may be conceded that he withheld no fact from the administrator that he was compelled to disclose, and the chancellor may close his eyes as to the great inadequacy of the sum paid, and still the fiducial relation that the appellee, Hodge, occupied towards the parties to the litigation, and the property involved by it, prevented him from making the purchase, or speculating on the trust fund. He will not be permitted to derive any benefit from such a purchase, and to establish a contrary rule would be an inducement to the officers of the court, who have the control of the property and the distribution of the proceeds, to protract the litigation until all parties in interest are ready to sacrifice their claims in order to have it ended.

The law has wisely removed all temptation from officers of the court and others occupying fiducial relations to the parties and the property in litigation, in declaring that the purchase, when made, shall enure to the benefit of the parties interested, and is voidable at their election. High on Receivers, after discussing the relation of such a fiduciary to the fund under his control, proceeds to say: "The general rule as above stated, denying receivers the privilege of becoming purchasers of property pertaining to their trust, is entirely independent of the question whether any fraud in fact has intervened." (Section 194.) The equitable doctrine is so well understood that it requires no reference to authorities in support of it, and the court erred in dismissing the petition as against Hodge.

The question next arises as to the liability of the surety on the bond of Hodge as special commissioner. The petition fails to state a cause of action against the surety, and the facts of the record show that the surety is not responsible. The action is on the receiver's bond against principal and suerty for failing to pay the money over under an order of the court. Waiving the question as to whether such an order had been entered, still the surety is not liable.

At the time this bond was executed the fund in controversy, so far as the record or the facts show, was the property of the appellee, Hodge. The appellant had not then elected to avoid the contract, and the transfer had been made by the appellant to Hodge before Barnett became his surety. It appears that after this transfer had been made some of the creditors, becoming uneasy, required Hodge to execute a new bond, and Barnett became the surety. The surety had the right to believe that the receiver was in fact the owner of the fund, and he no doubt would have hesitated in assuming the responsibility of surety had he been informed that the receiver was liable to the appellant for over three thousand dollars. It is not alleged that the surety had notice of any fraud, or of the intention of Titherington to avoid the contract.

The appellant had placed it in the power of appellee Hodge to waste or dispose of the fund as his own long before the surety became liable, and the latter is in court with his defense insisting that the purchase was made in good faith. The party entitled to the debt will not be permitted to transfer it to the fiduciary and then reclaim it of a surety who became subsequently bound for the acts of the trustee, without any knowledge of the fraud, if any, or without the knowledge even of the character of the transaction between the parties. As between the surety and the appellant the latter must bear the loss, and it would be unjust to the surety to hold otherwise.

The judgment is, therefore, reversed as to Hodge, and remanded for further proceedings, and affirmed as to Barnett.

Cook & Towery for appellant.

Wm. Lindsay for appellees.

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## GALLOWAY v. COMMONWEALTH.

(Filed Feb. 22, 1883—Not to be reported.)

1. Indictment—Distinct offenses—An indictment which charges that defendant and another "did conspire, confederate and agree to and did kill and murder," does not charge two distinct offenses—murder and conspiracy to kill—but charges the one offense of murder in pursuance of a conspiracy.

2. Reading indictment and plea—Criminal Code, section 219, which requires the clerk or Commonwealth's attorney to read the indictment and plea to the jury before they are sworn is mandatory, and must be substantially com-

plied with. But if the indictment and plea are read at any time before the close of the evidence for the prosecution and by an attorney assisting the Commonwealth's attorney, at the latter's request and without objection from the defendant, the section is substantially complied with.

3. Competency—Conspiracy—Under Criminal Code, section 234, which provides if several are jointly indicted for the same offense, each is a competent witness for the other unless the indictment charges conspiracy, the question of competency is to be determined by the court on all the evidence introduced by both parties.

4. Res gestæ—Generally declarations to be competent as res gestæ must be contemporaneous with the act. Yet when they are connected with it or grow out of it, they are, even when made after a lapse of time, admissible.

5. Manslaughter, being in its nature unpremeditated, can not be committed in pursuance of a conspiracy.

6. Whether the maxim "falso in uno, falso in omnibus," shall be applied to a witness is in the discretion of the jury.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, having been tried separately under a joint indictment against him and Frank Galloway, his brother, for the murder of William Southern, and convicted of manslaughter, prosecutes this appeal.

The objection that the indictment charges two distinct offenses can not be sustained. But one offense, murder, is charged. The statement that they "did conspire, confederate and agree to, and did, kill and murder," being equivalent to stating that the crime of murder was committed in pursuance of a conspiracy between them.

One of the errors complained of is that the indictment was not read, or the plea of the defendant stated to the jury previous to the introduction of evidence for the Commonwealth, and was not done at any time by the clerk or Commonwealth's attorney.

It appears that at the close of the examination in chief of the last but one of the witnesses for the prosecution the Commonwealth's attorney stated to the court he had failed to read the indictment and state the plea of the defendant, and then offered to do so, to which the defendant objected. But the objection was overruled, and thereupon the indictment was read, at the request of the Commonwealth's attorney, by an attorney engaged to prosecute, and the plea stated.

On the trial of a felony case the indictment is required by the Criminal Code to be twice read, once by the clerk to the

defendant, which may be dispensed with by the court with his consent, and once to the jury by the clerk or Commonwealth's attorney.

The record shows that the arraignment was dispensed with, and the defendant pleaded not guilty. But section 219, which requires the clerk or Commonwealth's attorney to read the indictment and state the plea of the defendant to the jury, next in order after they are sworn to try the issue, was not complied with as respects either the officers whose duty it is to do so, or at the time prescribed.

The language of the section is mandatory, and no party can be legally convicted under an indictment unless its requirements are substantially complied with. And if the verdict in this case had been rendered by the jury without having had the indictment read and plea stated before the conclusion of the evidence by the Commonwealth, we should have felt constrained to reverse the judgment upon that ground, for we are not permitted to assume or to speculate as to the probability that the jury in any given case have been fully and correctly informed in regard to, or that they comprehended the issue they were sworn to well and truly try, where it appears the mode of informing them that the law peremptorily requires to be pursued has been disregarded altogether.

But in this case, though not done at the precise time required by the Criminal Code, the duty was performed before the close of the evidence for the Commonwealth, while it was still in the power of the court to recall the witnesses and give to the party desiring an opportunity to re-examine them. And as no motion was made for the recall of the witnesses we do not perceive how the substantial rights of the defendant were prejudiced by the omission now complained of. Nor is the mere fact that the indictment was read by an attorney employed to prosecute, instead of the clerk or Commonwealth's attorney, ground for reversal, having been done at the request of the latter officer in the presence of the court and of the defendant, without objection made at the time.

While appellant was entitled to be tried in the mode prescribed by law, and to appeal to this court for reversal of errors to the prejudice of his substantial rights, he can not be heard here to complain of correctible errors he objected to

have corrected by the lower court, or of one he failed to except to at the time the law makes it his duty to except.

The next error complained of is the refusal of the court to permit Frank Galloway, whose evidence, it clearly appears, was important, to testify as a witness in behalf of appellant.

Section 234, Criminal Code, is as follows: "If two or more persons be jointly indicted for the same offense, each shall be a competent witness for the other, unless the indictment charges a conspiracy between them."

In the case of Christian v. Commonwealth, 13 Bush, 264, this court, construing that section, held that "although a conspiracy is charged in the indictment, defendants jointly indicted are competent witnesses for each other unless there is such evidence as, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy."

According to that construction, the question of competency in such a case as this is to be determined by the court from the evidence introduced on the trial. The inquiry, however, should not, as contended, be limited to the evidence offered by the Commonwealth, but the opinion of the court should be formed from the evidence in the whole case, such weight as it may deserve being given to the evidence introduced for the defense, as well as that of the Commonwealth.

It is shown by the evidence that at the time he was killed the deceased was residing upon a "bottom" farm with his sister-in-law, but who owned or controlled it does not appear, and was, in order to open a passway to a public road, engaged in tearing down and rebuilding nearer the dwelling house a division plank fence that had stood between the farm and the land of McCann, who was a brother-in-law of appellant, and Frank Galloway, and with whom they resided. And at the same time McCann and appellant were engaged in building a worm fence parallel to, and a few feet from, the plank fence deceased was building.

No ill feeling is shown to have existed between McCann and deceased on account of the removal of the division fence, and why appellant and Frank became offended at him on that account, if they did so, does not appear.

Though appellant and deceased were employed near each other in building the two fences from about nine o'clock in the morning until two or three in the afternoon, when the killing was done, no harsh language or hostile demonstration on the part of either is shown to have occurred.

The Commonwealth introduced no witness who saw the beginning of the difficulty that resulted in the death of Southern. One of them, his niece, testified that when she heard the first pistol shot she got up, and saw, through the window of the room she was in, about forty yards off, appellant standing on the right side of, and about twenty feet from, deceased, with a pistol in his hand, and Frank about the same distance in front of him; that both of them shot at Southern, four shots being fired, and he fell about twelve feet beyond the worm fence, upon the land of McCann, wounded on the right side of his head and right shoulder, and that as soon as he fell they left, going in the direction of their home. Two other witnesses were in the house at the time, who testify to the number of shots fired, but neither of them saw the shooting, or the parties until they started to leave. Frank Galloway was not seen upon the ground by any of the witnesses for the Commonwealth until after the firing began, nor was he there until a short time before.

Two witnesses testify to conditional threats of violence to deceased previously made. Their statements being, substantially, that Frank said he would kill him if he tore the fence away, appellant remarking at the same time, and in the same connection, that he had good pistols. They also testified that they both threatened to kill deceased if he did not lease the "bottom."

The evidence of McCann, who was present, and of James Galloway, the father of appellant, who stated he was thirty-five or forty yards off, show that deceased commenced the altercation, threatening to kill both appellant and Frank Galloway, and did actually assault the latter with a hatchet before any shot was fired. And, according to their evidence, the shooting was done by Frank Galloway alone, and done in his necessary self-defense, appellant not participating in it at all. The mother and sister also testified that deceased had made conditional threats against both of them.

If the evidence of witnesses for the Commonwealth be alone considered, the conspiracy charged in the indictment was established with reasonable certainty, and the evidence of Frank Galloway was properly excluded. But if credence be given to the evidence of James Galloway and McCann, then the existence of the alleged conspiracy, as well as the guilt of appellant, is negatived. And we are unable to perceive how the court could, without disregarding their evidence, have excluded that of Frank Galloway.

But from necessity a question like this must be, to some extent, left to the discretion of the judge who presides at the trial, and is in the best position to correctly determine it. Therefore, in view of the fact that the credit for veracity of James Galloway was impeached, and both he and McCann were shown to have previously made statements contradictory in important particulars to those they made on the trial, we do not feel authorized to say that upon the evidence admitted and heard at the trial the court erred in excluding the evidence of Frank Galloway.

But appellant complains that the court erred to his prejudice in refusing to permit the witnesses introduced to contradict James Galloway to tell all he said on the subject at the time he made the alleged contradictory statement, and also in excluding from the jury what was said to James Galloway by Frank Galloway about the killing immediately after it took place.

If these rulings of the court were such as to deprive appellant of any evidence he was legally entitled to, or to destroy or impair the legitimate effect of that which was introduced in his behalf, he was prejudiced, not only as to the question of competency of Frank Galloway as a witness, but also upon the issue, for the excluded evidence has a bearing upon both. The two justices of the peace who presided at the examining trial of appellant and Frank Galloway were introduced by the Commonwealth, and stated, in substance, that James Galloway swore as a witness at that trial that he did not see who fired the first shot, or any of them, because the wagon got between him and those engaged in the difficulty. This was in conflict with his statement to the jury that Frank alone did the shooting.

As a matter of right appellant was entitled to all the evidence given by James Galloway on the examining trial that was relevant or tended to reconcile the apparent contradiction. But what he averred he could prove by the justices of the peace, if permitted to state all the evidence given by James Galloway on that occasion, as appears from the paper presented to the court, threw no additional light upon the question as to what he had sworn about the shooting, being substantially but a mere repetition of what had already been detailed to the jury, of which appellant got the full benefit. While there was no valid objection to the evidence, we do not see how its exclusion prejudiced his rights.

Counsel contends that what was said by Frank to James Galloway should have gone to the jury as part of the res gestæ.

Res gestæ have been correctly defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. They must be part of the immediate preparation, or an emanation of such act, and not produced by the calculated policy of the actors seeking to manufacture evidence for themselves. (1 Wharton's Law of Evidence, section 259, and authorities cited.) Though generally declarations, to be admissible as part of the res gestæ, must be contemporaneous with the act, yet when they are connected with, or grow out of, it they may, even when made after a lapse of time, be admissible; as when an accident happens and the injured party declares to the physician, called soon after the accident, how it happened, or a person immediately escaping from an assault declares who committed it (Harrison v. Stone, 57 Missouri, 98; Commonwealth v. McPike, 3 Cush., 181), and so the landlord of a hotel, when a party has shot himself, was allowed to testify that the occupant of an adjoining room came out seemingly excited, saying something about the man having shot himself. (Insurance Co. v. Merly, 8 Wall., 397; Newton v. Mutual Benefit Life Insurance Company, 2 Dill., C. Ct., 154.)

On the trial of a prisoner for murder a statement made by him a few minutes after the homicide, near the place and in the presence of eyewitnesses of the homicide, who were not

called by the Commonwealth, is admissible for the prisoner as part of the res gestæ. (Little's case, 25 Gratt., 921.)

In Jordan's case, 25 Gratt., 945, the description of the robber as given by the wife of the person robbed to the officer a "few minutes" (how many does not appear) after the crime was committed was admitted as a part of the res gestæ. So the declaration of a defendant as to the circumstances under which he killed a runaway slave, made immediately after the fact, are admissible in an action for trespass for killing the slave. (Hart v. Poners, 18 Ga., 635.)

Applying the foregoing definition, and principles deducible from the cases cited, to this case we think that what was said on the occasion referred to by Frank to James Galloway was improperly excluded from the jury. What was said was: "What shall I do? I could not help it. Must I not go and deliver myself up? I was sorry to have to do it; if I had not killed him he would have killed me."

According to the statement of James Galloway, when the killing occurred, he was thirty-five or forty yards away, and immediately it occurred appellant and Frank Galloway came away, meeting witness about seventy-five yards from the place of the killing, when the declarations were made which the court excluded. The declarations, though not amounting to a circumstantial detail, which would really make them objectionable, are illustrative of the act, and if credited by the jury would conduce to show the killing was done by Frank Galloway alone, and done in self-defense.

They were not contemporaneous with the principal fact, it is true, but they are so connected with it as that they may be reasonably regarded as the result and consequence of the coexistent motives. While neither the time that had elapsed, nor the circumstances under which the declarations were made, indicate them to have been the result of deliberateness or wariness, for, according to the evidence of a witness for the Commonwealth, appellant and Frank Galloway left immediately after the shooting, and when seen by that witness were twenty steps from deceased, running, and continued to run until they got to the place where James Galloway met them, and the declarations were made to him by Frank Galloway.

The only question, therefore, left for us to consider is whether the exclusion of the evidence by the court prejudiced the substantial rights of appellant. Its importance and bearing upon the question of conspiracy, as well as guilt of appellant, have been already stated, and is decisive of the question, for we do not consider the fact that the credit of James Galloway was impeached and the evidence he did given was disregarded by the court and jury as a sufficient reason for excluding the declarations alleged to have been made to him by Frank Galloway.

It is not always the case that the entire tetimony of a witness is discredited because he may be contradicted or even impeached. The maxim falso in uno, falso in omnibus, is merely advisory, and may be applied or not by the jury in their discretion; it certainly should not control the court on a question of competency of evidence.

Counsel for appellant contend that the verdict of the jury being for manslaughter, it was the duty of the court, after such finding, to grant a new trial on account of the error in excluding the testimony of Frank Galloway thus made manifest.

Counsel are correct to the extent that the crime of manslaughter can not be committed in pursuance of a conspiracy, which is a combination by concerted action of two or more persons to accomplish a purpose.

But as held by this court in the case of Christian v. Commonwealth, supra, it is for the court and not the jury to determine from the evidence as to the competency of the witnesses in such cases, and, besides, as the decision of the court must in each trial precede the verdict of the jury, the first can not be controlled by the latter.

Construing instruction number 1, in connection with number 5, given at the instance of appellant, the objection to the former, that it takes from the appellant the right to judge at the time of the necessity for killing the deceased, is removed, for in the latter the jury are told that "if the accused or his brother shot and killed the deceased, believing, and having reasonable grounds to believe, that the deceased would then and there kill them, or either of them, or inflict great bodily harm, then he is excusable on the ground of apparent necessity," etc.

In instruction No. 2, given at the instance of the accused, the jury are told that before they can convict him of murder, for aiding or abetting, they must believe he was present, willfully and maliciously aiding or abetting, etc. The jury, therefore, was not misled by the omission complained of in the third instruction for the Commonwealth.

So instruction No. 4 for the Commonwealth is fully explained by No. 5, given for appellant, and the right of appellant to kill in defense of his brother, which it is objected was omitted from the former, is recognized in the latter instruction.

It is objected that instruction No. 7, given to the Commonwealth, and 5, to the defendant, are qualified by adding to each substantially the following: "Unless they believe from the evidence that they began the difficulty."

Except from the testimony given by witnesses for appellant there is no proof as to how the difficulty began. And it was, therefore, improper to assume as a hypothesis that appellant or his brother began the difficulty in the absence of evidence to support it.

We perceive no other error in the record, but for the two mentioned the judgment of the court below must be reversed and cause remanded, with directions for a new trial consistent with this opinion.

Thompson & Roach, P. B. Thompson, jr., and John C. Thompson for appellant

Bell & Wilson and P. W. Hardin for appellee.

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## KENTUCKY SUPERIOR COURT.

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### HARTLEY v. ELLIS, GD'N.

(Filed September 10, 1883.)

**Guardian and ward—Where an ex parte settlement is made of a guardian's accounts by the county court, the guardian representing the infant and filing no exceptions, and a balance is found due the guardian for which he sues, the settlement may be surcharged and the case referred for a new settlement. But where the settlement is made by the county court upon notice and after exceptions filed and acted on, the settlement can be revised on appeal only and not by original bill to surcharge.**

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Reid.

Appellant was the guardian of W. B. Powell, an infant. As such he settled his accounts and there was found due the guardian $167.22. Appellant resigned his trust, and appellee was appointed his successor.

This action was brought by appellant to recover the amount alleged to be due him on the settlement. The defense assailed the settlement last made, and other settlements on which it was based, and sought to surcharge them.

The case was referred to the master, and on a statement of the account, a small balance having been found due by the guardian, his petition was dismissed.

The settlement of May 24, 1876, on the result of which this action is based, was ex parte. The guardian represented the infant. No exceptions appear to have been filed by any one in behalf of the infant. Indeed the settlement laid over, in the usual way, for one month, and the order confirming it recites that no exceptions were filed. The ward's infancy still continued, as shown by the appointment of a subsequent guardian, and he could not represent himself. The right to have a correct statement of account in an action founded upon a settlement made under such circumstances is unquestionable. To hold otherwise would place defenseless infants in the power of rapacious and dishonest guardians.

This case is clearly separated from that class of cases embraced by county court settlements, where the parties interested have notice, and where exceptions are filed and acted upon. There the county court, as said by the Court of Appeals, in the case referred to, has complete jurisdiction and the right to hear and determine all questions made by the parties who, if they consider themselves aggrieved, have a remedy by appeal, and not by original bill, to surcharge the settlement.

Here the county court settlement was only prima facie correct. It was not attacked by exceptions in the county court, and was not, therefore, a final adjudication of the rights of the parties. The duty of the subsequent guardian to see that a proper settlement was made was imperative, and his right to have the aid of the chancellor is indisputable.

The judgment is affirmed.

Lockhart & Hallam for appellant.

## McKEE v. SMITH'S ADM'R, &c.

(Filed September 21, 1883.)

**Reversal—Commissioner—Where a commissioner is appointed under a judgment afterwards reversed, but not superseded, and has paid out all the funds in his hands and fully settled his accounts, the subsequent reversal of the judgment does not make him liable for overpayments to the distributees. The distributees themselves are liable.**

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Reid.

As McKee, while commissioner and receiver of the court, under the authority of a judgment that, though afterwards reversed, was not superseded, paid out the funds in his hands, settled his acounts and was relieved of his trust before the record even was filed in the Court of Appeals, it seems to us that this ought to afford him complete protection as to any liability on a restatement of accounts acording to the opinion of the Court of Appeals, growing out of the fact that, as commissioner and receiver, he had made overpayments to the distributees. The latter alone would be liable. For any overpayments to McKee, as assignee of Thomas Smith, he should be held to account. His claim for $50 for services as commissioner was properly allowed. On the adjustment McKee, out of anything that may be due to the devisees of James B. Smith, and the heirs of Ellen Cavender, of Wm. Smith, of Mary Woods and of Ann Sidonen should be allowed his adjudged lien of $850.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

George R. McKee for appellant.

W. H. Miller for appellees.

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## COMMONWEALTH v. LANCASTER.

(Filed September 7, 1883.)

**1. Appeals—If an appeal is taken to Court of Appeals of which Superior Court has jurisdiction, it shall not be dismissed, but transferred to the court having jurisdiction. (1 Acts, 1881, page 111, section 6.)**

**2. But when an appeal is not granted to Superior Court or transferred to it by Court of Appeals the act of filing the record with clerk and docketing the case does not bring appellee into that court.**

Appeal from Marion Circuit Court.

Opinion of the court by Presiding Judge Bowden.

A demurrer to the indictment was sustained, and an appeal was prayed and granted to the Court of Appeals.

By section 6 of the act creating this court it is provided that if an appeal shall be taken to the Court of Appeals of which the Superior Court has jurisdiction, it shall not be dismissed, but shall be transferred to the court having jurisdiction. It is this order of transfer which, correcting the mistake below, gives the appeal a legal standing in this court, and constitutes the record evidence of its authority to adjudicate. When an appeal is not granted to this court, or transferred to it by order of Court of Appeals, the mere act of filing the transcript with the clerk of this court, and having put the case on its docket, does not subject the appellee to its judicial authority.

It is, therefore, ordered that the case be stricken from the docket, there being no such appeal pending in this court.

Finley Shuck for appellant.

Hill & Rives for appellee.

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## DRAKE'S ADM'R v. SIMONIN, &c.

(Filed September 14, 1883.)

1. Appeals—Appeals from Superior Court to Court of Appeals must be granted within six months, except in certain cases; and the clerk must transfer the case to be tried on the same record.

2. After granting the appeal Superior Court has no further jurisdiction of the case and can not enforce its mandate unless Court of Appeals decides that it has no appellate jurisdiction, and so certifies to Superior Court.

Appeal from Webster Circuit Court.

Opinion of the court by Presiding Judge Bowden.

All appeals to the Court of Appeals from the judgments of this court must be prayed and granted in this court, and within six months from the time the right to appeal accrued, except in cases of certain disabilities. When the appeal is granted the clerk must transfer the case from our docket to that of the Court of Appeals, to be then tried on the same

record. When that court decides the case its mandate goes directly to the trial court; no official information even ever comes to let us know what has been done. No party is permitted to supersede our judgment; the necessity for it is not recognized; the moment the appeal is granted the case is transferred to the Court of Appeals, and this court has continually lost all control of it, as said in Boaz v. Miliken, 4 Kentucky Law Reporter, 700, "its jurisdiction is exhausted, and it can make no further order."

The only condition on which it may, therefore, enforce orders theretofore made, or make new ones, is that the Court of Appeals should decide that it has no appellate jurisdiction, dismiss the appeal as granted by this court, and certify its action. If that should not occur, but if that court should assume jurisdiction, the mandate of this court would, from the day the appeal was granted, be without any legal force. It is our opinion that an order granting an appeal, of its own force, supersedes all proceedings under a mandate of this court, and that the assumption of jurisdiction by the Court of Appeals renders it permanently inoperative. Such is declared to be the effect upon the mandate issued heretofore in this case.

C. M. Cook for appellant.

D. H. Hughes and W. P. D. Bush for appellees.

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## PIATT v. OLIVER.

(Filed September 12, 1883.)

**Bill of exceptions—The action of the lower court in giving or refusing instructions can not be inquired into on appeal unless the bill of exceptions is certified to contain all the evidence or all material facts which the evidence conduced to prove.**

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Reid.

By the Code of 1876 it is provided if an appeal is prosecuted on the ground that the verdict is not sustained by the testimony, the evidence must be presented in full, and "the judge shall certify in the bill of exceptions that it contains all the evidence." This seems to be conceded, but it is contended

that under the New Code all questions as to giving or refusing to give instructions may be inquired into on appeal, even where the bill of exceptions fails to show or state it contains all the evidence.

We do not so interpret the Code, or construe it to change the well established rule that where a party undertakes to present the evidence in detail, before he is entitled to have an examination of the appeal on questions relating to the evidence on the law, the bill must show or state it contains all the evidence.

The provision for the trial of questions of law, on the material facts, succinctly stated, and certified to by the judge as true, without any detailed statement of the evidence, is a convenient method that may be pursued, but when so pursued the statement must have the certificate of the judge that it is true. The bill in this case is not made out in the manner suggested, nor is there any certificate of the judge that it is true.

Petition oevrrued.

McKee & Finnell for appellant.

M. L. Roberts for appellee.

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## JONES v. MARTIN.

(Filed March 14, 1883.)

1. Revivor of judgment—Under Civil Code, section 402, upon the death of the plaintiff after judgment, execution shall issue in the name of his personal representative, and the clerk shall endorse on the execution the name of plaintiff, his death, and the name of the personal representative. Section 404, which provides that the clerk, before making such endorsements, shall require the personal representative to file an affidavit manifesting his right, and also a copy of his appointment, is directory. And a sale made under execution endorsed in favor of a personal representative, but without such affidavit, is not void but valid.

2. Execution levy on joint property—Under Civil Code, section 660, where an execution is levied on personal property jointly owned by the debtor and another, the execution creditor obtains a lien only on the property. A sale of it under the execution is void.

3. Although the sheriff fails to inventory and appraise the property levied on under section 660 and to return the inventory and appraisement with the execution, the creditor has the lien provided by that section.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Reid.

Jones, alleging that he and Martin were joint owners of a crop of barley, and that Martin had sold the entire crop and received the money, sued Martin, in asumpsit in ordinary, for $520.37, the alleged amount of Jones' one-half interest.

Before answer, and on motion of Martin, the case was transferred to equity, the court below dismissed the petition, and Jones has appealed.

Martin's defense to the action was that he purchased the interest of Jones in the barley at public sale made by a constable of Woodford county, under an execution that issued from the Woodford Circuit Court, on a judgment in favor of Martha Martin, deceased, and against Jones. It appears that Martha Martin had such judgment; that her son, Wm. Martin, jr., was appointed and qualified as her administrator; that on May 16, 1878, an execution issued on said judgment, directed to the sheriff or any constable of Woodford county; that the clerk made this endorsement on the execution: "Mem.: The plaintiff, Martha Martin, has departed this life, and Wm. Martin, jr., has qualified, and is now acting, as her administrator; attest, Swift Darneal, clerk." It further appears Jones admitted that the administrator did not file with the clerk the affidavit required by statute, or a copy of the order showing his appointment as administrator.

The constable, Arnett, who received this execution, levied it upon "all the right title and interest" of Jones in the barley, "which interest was 495 bushels and 31 pounds of barley," and after advertisement sold it at public auction, and appellee, Martin, became the purchaser at forty cents per bushel, and the proceeds, after consuming $138.77 for threshing, amounting to $59.48, were applied to the execution.

The first question raised is, was the execution void or voidable?

At the common law, upon the death of a plaintiff in a judgment the judgment abated, and before it could be enforced had to be revived by scire facias. But in Morgan v. Winn's Adm'r, 17 B. Monroe, 244; Venable v. Smith's Ex'r, 1 Duvall, 195, it is held that under our Code a judgment does not abate by the death of a plaintiff, but that proceedings on it are simply suspended until the grant of administration, and until an ex-

ecution can issue in the name of the personal representative, upon proper endorsement by the clerk. There must be some person in esse in whom the legal title can vest, who can carry on the proceedings so that the defendant can be secure in his rights, such as the right to pay the debt or to replevy it. Under our practice in such cases the execution is issued following the judgment in the name of the plaintiff in the judgment, and an endorsement is made on it by the clerk, showing the name of the original plaintiff, his death, and the name of the personal representative, and the effect of this endorsement is to constitute the personal representative the real plaintiff in all subsequent pleadings.

It is true that by section 404 of Civil Code it is provided that the clerk, before making these endorsements, shall require the person claiming right to the execution to file an affidavit manifesting his right, and also a copy, properly certified, of his appointment as successor or representative by a competent tribunal. It is conceded this was not done in this case. In all other respects the suit conformed to the requirements of the Code; but appellant insists for this reason the execution was utterly void, and no rights can attach under it. If the provisions of the Code are imperative the execution was void; if directory it was voidable only.

It seems to us that the requirements of the Code as to the affidavit and order of appointment are directory to the clerk, and that a failure to file the same before the endorsement is made does not render the execution void, but voidable and exposed to quashal on motion. Any other construction would convert the sheriff into a judicial officer whose duty it would be to pass on the validity of the writ, and would imperil the rights of purchasers under execution sales. These provisions of the Code have never received direct construction in Kentucky.

In a MS. opinion, reported in Myers' Code, 508, Andy's Adm'r v. Tanner, Stites, J., it is said: "The endorsement upon an execution authorized by section 482 confers no right upon the administrator to enforce it until the affidavit required by section 484 shall be filed with the clerk by one of the plaintiffs, and also the certificate of the administration, and a replevin bond taken under an execution without such affidavit and

certificate should be quashed upon motion." As this record was burned we can not have access to it, but from this extract it seems clearly inferable that the bond was liable to be quashed, not because the execution was void, but because it was irregular to issue it until the affidavit and order of appointment had been filed with the clerk.

Neither the case of Winn's Adm'r v. Morgan, 17 B. Monroe, 244; Venable v. Smith's Ex'r, 1 Duvall, 195, nor that of Burge's Adm'r v. Brown, &c., 5 Bush, 587, sheds any light on the point under review. They simply settle the question that neither a judgment nor execution abates upon the death of the plaintiff, but is suspended until the statutory requirements are complied with, so as to enable the clerk to make the endorsement. They do not hint at what effect the failure to file the affidavit and copy of appointment would have on the execution itself.

The practice in other States being unlike ours, no definite aid can be derived from many of the adjudications on this subject.

The case of Brown v. Parker, 15 Illinois, 307, upon analysis proves not to be a case in point. Under the laws of that State, where either party to a judgment dies before execution issues, there are two concurent modes of revivor, one by scire facias and the other prescribed by statue. By the statutory mode if the plaintiff dies after the rendition of the judgment his personal representative, on recording in court the letters of administration, may sue out an execution in his name; if a defendant dies after judgment the plaintiff may sue out an execution on giving his personal representative three months' notice of the existence of the judgment. In the case relied on the execution was sued out several years after the death of the judgment creditor, without first reviving the judgment in favor of the personal repersentative by scire facias, or recording in court whence the execution issued his letters of administration. These being required to be a matter of permanent record, we can well see why a failure to comply with the statute would render the writ void. Besides, it appears that the execution was issued in the name of the deceased plaintiff, and there

was nothing to show there was any personal representative, or that the original plaintiff was dead.

In the other case relied on, of Stewart v. Nuckols, 15 Ala., 225, it does not appear what the statutory law in that State is, but it does appear that the execution under which the land was sold was issued in the name of a party who had been dead for some time.

Here the execution was, in effect, in the name of the personal representative, and not in the name of the dead judgment creditor. The endorsement by the clerk showed she was dead, and that she had a personal representative then acting. This endorsement indicated clearly there was a person to whom the legal title to the judgment had passed, and who had the right to enforce it. It also showed there was a plaintiff having an actual existence and qualified to conduct and control all subsequent proceedings on the writ.

This endorsement clothed the execution with vitality, and if made by the clerk without having required the party to file the affidavit and order of appointment it was a mere irregularity that furnished grounds for quashal. The filing of these papers with the clerk is the designated means by which he may be informed of the death of the plaintiff and the appointment of his personal representative. The provision that he shall require them to be filed before making the endorsement is simply directory, and his failure to have it done does not render the execution void, but irregular. They are not required to be made matters of record, while the endorsement is. This view receives some support from the adjudications of the Court of Appeals on an analogous question.

By the act of 1828 to amend the execution laws of the State (volume 1, Statute Law, 646 and 647) it was provided that executions upon judgments should not be issued to any county other than that in which the judgment was rendered, or in which the defendant resided, until the plaintiff filed with the clerk his affidavit setting out certain facts, and this enactment is substantially found in the General Statutes, chapter 38, article 16, subsection 1.

The Court of Appeals, in construing the effect of this requirement, has held that an execution issued to a county other than the county in which the defendant resided, or in which

the judgment was rendered, without the affidavit required by statute having been filed, is not void, but only irregular and voidable, and a sale of land under such execution was held valid. (Cox v. Nelson, 1 B. Monroe, 94; Commonwealth, for, &c. v. O'Call, 7 J. J. Marshall, 151; Young v. Smith, 10 B. Monroe, 296.)

The next question for consideration is the effect of the levy of the execution and the sale under it.

Prior to the act of February 12, 1858 (Myers' Code, page 202) regulating the sale under execution of property held jointly by the debtor with others, such interest could be siezed and sold and the sale conducted as if the debtor was the sole owner of the property levied on; and where the execution creditor sought to subject to sale the interest of one of the partners his right to do so was unquestioned, and if the other partner claimed the whole of the firm effects for the benefit of its creditors he was compelled to resort to a court of equity for a settlement of the partnership. (Aldrich v. Wallace, 8 Dana, 287; Watson v. Gabby, 18 B. Monroe, 663.)

The act of 1858 introduced a new mode of procedure, and is substantially incorporated in section 660 of the New Code, which says: "If an officer levy an execution upon personal property held by the exceution debtor jointly with another person—

"1. The officer shall not deprive such person, without his consent in writing, of the possession of the property, except for the purpose of having it inventoried and appraised, which he shall cause to be done pursuant to the provisions of section 646.

"2. The officer shall return the inventory and appraisement with the execution to the office from which it issued, and shall state in his return the facts connected with the levy and the claim of the joint owner.

"3. The execution creditor shall have a lien upon the property levied on such as is given by law to an execution in the hands of an officer, and upon the aforesaid return the creditor may enforce said lien by an action in equity."

It is conceded here that the barley was jointly owned by Jones and Martin. While we are inclined to hold that the levy as made, though the officer's return is inaptly expresed, it was such as would create a lien in favor of the execution credi-

tor which might have been enforced in equity, although the officer failed to have the property inventoried and appraised, and to return the inventory and appraisement with the execution, yet our conclusion is he had no power to make any sale and that the sale made was void and passed no title to the purchaser. The fundamental purpose of the provisions above quoted was to prevent sales of the interests of separate joint owners in personal property under executions, to avoid the sacrifice of the rights of the joint owner not in the execution, and to substitute a new and distinct mode of proceeding in equity by which the interests of all could be fully protected. After the levy is made and the duties pointed out are performed by the officer his powers are exhausted, and the only remedy the execution has is to enforce his statutory lien by equitable proceedings.

In Payne v. Pollard, 3 Bush, 129, the execution was levied in favor of Payne upon property held jointly by the debtor, Pollard, with others, which interest was sold and conveyed to Payne. The court held that the officer should have proceeded as directed by the act of February 12, 1858; that no sale ought to have been made; that the sale and conveyance were invalid, and that the purchaser only acquired a lien by the levy, which could be perfected by equitable porceedings.

It follows from these views that Martin took no title by his purchase at the constable's sale, and that Jones' right of recovery against him exists as if no sale had been made. Jones had no claim against Martin for money had and received until he sold the barley, about July 1, 1878, and the price he then obtained for it must be the consideration of recovery, which is conceded to be $1.04 per bushel.

But as the parties are in equity they must do equity.

Jones raised the barley on Davis' farm, and Martin bought out Davis' interest in it. By the contract with Davis, Jones was to have the crop threshed at his charge. The price paid for this was $138.77, and it enured equally to the benefit of the joint owners. It also appears that Martin paid $59.48, as of June 29, 1878, on the execution debt against Jones, which operated as an extinguishment pro tanto of a debt Jones does not controvert.

Jones is entitled to a judgment against Martin for $520.37, less $138.77, subject to a credit of $59.48, as of June 29, 1878, and to legal interest on the remainder from July 1, 1878, until paid.

The judgment is reversed and cause remanded with directions to render a judgment for Jones as herein indicated.

G. W. Gillispie for appellant.

D. L. Thornton for appellee.

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## DANCE, &c. v. PENDLETON COUNTY COURT.

(Filed September 17, 1883.)

1. Sheriff—County levy—If the sheriff fails to execute the county levy bond and the county court to appoint a collector therefor, the sheriff and his sureties are liable (under General Statutes, chapter 27, article 3, section 9) on his official bond for the county levy collected by him.

2. Pleading—In an action by the county to recover of the sheriff and his sureties the petition must allege that the county court failed to appoint a collector; that the sheriff had collected the amount claimed and that there was a balance left after paying the county creditors, which he refused to pay over.

3. Evidence—A judgment obtained in an action against the sheriff to settle his accounts is evidence in an action against his sureties, but can not be made the basis of the cause of action itself.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Richards.

Minor Calvin, sheriff of Pendleton county, without executing the bond required by General Statutes, chapter 27, article 2, section 4, proceeded to collect the county levy for the year 1878.

Failing to settle therefor, the county brings this action to collect an alleged deficit, and both the sheriff and the sureties on the bond executed by him when he first qualified are made defendants. It was repeatedly held under the Revised Statutes that if the sheriff proceeded to collect the county levy without executing the bond required therefor the sureties upon his other bonds were not liable. But the General Statutes, under which the bond in question was executed, have provided that: "If for any cause the sheriff shall fail to execute the bond provided for in this chapter (the county levy bond) and the county court failing to appoint a collector, the sheriff

shall, in virtue of his office, proceed to collect the county levy, then he and his sureties shall, in all respects, and to all intents and purposes, be responsibe on his official bond." (Chapter 27, article 3, section 9.)

By the official bond mentioned in this section the legislature clearly meant the bond executed at the time the sheriff was inducted into office. But the sureties on this bond were only to be held liable in cases where the county court had failed to appoint a collector, a fact not alleged in the petition before us.

Moreover this action is based upon a judgment alleged to have been obtained in a proceeding in equity instituted to compel the sheriff to settle his accounts. The sureties were not parties to that action. While that judgment might be evidence against the sureties in a proper action against them, it could not be made the basis of the cause of action itself. It should be alleged that the sheriff had collected the amount claimed and refused to pay it to the county, if entitled thereto. It is not sufficient to allege "that by said settlement in said suit it was ascertained that said Calvin had in his hands of said county levy, etc."

And again, the county levy can only be properly made for certain specified purposes to be shown in the order making it, which must also contain a list of the persons to whom the money is to be paid when collected. It is made the duty of the county clerk to give to the sheriff "a list of the persons to whom the county is indebted, and the amount to be paid by the sheriff to each one," and the sheriff is required by the same statute to pay the money directly to the county creditors according to their respective demands. (Chapter 27, article 2, section 6.) If he fails to pay them the creditors above can sue, and he is only liable to the county in case there is any balance left in his hands after settling with the creditors, or in case the county has paid the creditors out of other moneys. (Owens v. Ballard County Court, 8 Bush, 612; Lewis County Court v. Lovell, MS. opinion, October 22, 1882.)

But in this petition it is neither alleged that there was any balance left in the sheriff's hands after paying the county creditors, nor that the county was entitled to be substituted to the rights of those creditors.

It is true it is alleged that "the plaintiff (meaning the defendant) is still indebted to the plaintiff on account of said public dues and county levy, in said sum of $1,742.02, etc.," but this is only the statement of a legal conclusion.

As to whether the copying of the bond in the body of the petition obviates the necessity of alleging that was the undertaking of the defendants is not decided. Therefore, the judgment is reversed and the cause remanded with directions to sustain the demurrer to the petition, and give the plaintiff leave to amend.

C. H. Lee for appellants.

Clark & Applegate for appellee.

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## CARTER v. COMMONWEALTH, FOR, &c.

(Filed September 17, 1883.)

**Bastardy—Although the defendant in a bastardy warrant has executed bond for his appearance at the next term of court, he may nevertheless, at any time before answer to the merits, object to the sufficiency of the warrant.**

Appeal form Monroe Circuit Court.

Opinion of the court by Judge Reid.

The bastardy act of 1795 directed the arresting officer to take the person before a justice of the peace, who was authorized to bind him by a recognizance to appear at the next county court, to be void on his appearance. To escape incarceration he had only to execute this obligation. His appearance performed it. It was frequently held that if he appeared and answered to the charge he could not afterwards except to the sufficiency of the warrant. But we have been able to find no case in which it was decided that he coud not, on appearance and before answer to the merits, object to the sufficiency of the warrant. His right to do so seems implied in the dceision that the warrant is insufficent if it fails to state the date of the child's birth, for it can not be meant that being arrested the person may go to jail, and by doing so preserve a right to object to the warrant, which is lost if he gives a bond simply to appear, and so secures his freedom until court convenes.

In Schooler v. Commonwealth, Littell's Selected Cases, 88, decided in 1805, it is said: "Having appeared and pleaded to the charge he can never afterwards be permitted to avail himself of objection to the process and proceedings intended merely to coerce an appearance." This implies he could do so before pleading to the charge.

In Miller v. Commonwealth, 1 Bibb, 404, decided in 1808, it was held "that after an appearance and answer in chief to the merits it is too late to object to preliminary process intended to compel an appearance." This implies there is time when it is not too late.

In Walker v. Commonwealth, 3 Marshall, 356, it is said to be "too late to object to the sufficiency of the warrant in arrest of judgment." It is added, "when the recognizance to appear is given the warrant is functus officio," but this seems to be a mere dictum, and was not necessary for the decision of the case.

It is in conflict with all the implications of the prior cases, and with the decision in the case of Bennett v. Commonwealth, for Pearson, 4 B. Monroe, 106, holding that the warrant must state the date of the birth of the child, and the proof must conform to it. It is difficult to see why so valuable a document as the warrant should not be returned—one that limits the prosecution to the day fixed, and that will be a bar to any other prosecution fixing the same day. Why is it of any importance what the warrant contains or omits if givng bail for appearance at the trial court precludes the person from attacking it? Is it claimed that having or not having the right to assail the warrant depends on the giving or not giving the bail? On the going to jail or keeping out by a mere bond to appear?

In Commonwealth v. Hazelrigg, 18 B. Monroe, 30, the defendant had given the recognizance to appear, and on appearance he moved to dismiss the warrant because the statement the judge was required to make out was not returned with the warrant. It was held that the law did not require the return of the statement.

There was no other point in the case to decide, and the statement in the opinion "that when the defendant had entered into the recognizance for his appearance at court the warrant was functus officio, and that it was not even necessary for the mag-

istrate to report the warrant to the county court," is also a dictum, as no such question was raised.

The Revised and General Statutes require a bond not only to appear, but to perform the judgment of the court. That bond the appellant executed on the day he was arrested. There was no valid objection to it. The surety had given the county judge a power of attorney to execute it, signed by himself, and attested, and the judge signed his name for him. The motion to require a new bond was not necessary or authorized. He had made no defense. This was a preliminary objection taken in limine. It did not go to the merits. Better is his position than those whose cases are reported, he was not "too late," if it is possible to be early enough.

It seems to us while this is a civil proceeding it is so serious in its nature that a warrant good in law should be required as the condition of its prosecution; that the act should not be so interpreted that the defendant who gives the bond shall be in worse plight than he who goes to jail because he can not give the bond; that giving the bond should not have the effect of precluding him from making an objection which is open to all others, in even the least matters, that the proceeding is not sufficient to require him to plead to the merits. If he had pleaded to the merits, as did those whose cases are reported, it would have been a waiver of all defects and irregularities. The demurrer to the warrant should have been sustained.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Grinstead & Basham for appellant.

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## ABSTRACTS OF DECISIONS OF COURT OF APPEALS. NOT TO BE REPORTED.

### SWAN v. COMMONWEALTH.

Filed September 8, 1883. Appeal from Marion Circuit Court. Opinion of the court by Judge Pryor, affirming.

Criminal law—Maiming—The offense of biting off the lip of another is expressly within the provisions of section 1 of article 6, chapter 29, General Statutes, which imposes a punishment for maiming, and the facts being distinctly alleged the mere fact that the crime is designated as mayhem can not affect the verdict.

Russell & Russell for appellant.

Finley Shuck and P. W. Hardin for appellee.

## FERGUSON, BY, &c. v. FERGUSON'S EX'OR.

Filed September 8, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Hines, affirming.

Construction of devise—Trusts—Under a devise by a testator to another in trust for his daughter, with directions to the trustee to pay over to the guardian of the child during her minority the proceeds of the trust estate, for her support, maintenance and education, "as far as may be necessary," the trustee can pay over to the guardian only so much of the income of the estate as may be necessary to the support, maintenance and education of the child.

Barrett & Brown for appellants.

Chas. H. Gibson for appellee.

## LAWLESS v. SEVIER.

Filed September 8, 1883. Appeal from Barren Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Limitation—Clerical misprision—There is no limitation, except such as pertains to the bringing of actions, as to a motion to correct a clerical misprision or to vacate or modify a judgment for fraud practiced by the "successful party" in obtaining the judgment, and, therefore, section 344 of the Code has no application to such cases.

2. Vacation of judgment for fraud—The "successful party" referred to by subsection 4 of section 518 of the Code, which provides that the court shall have power after the expiration of the term to vacate or modify a judgment "for fraud practiced by the successful party in obtaining the judgment," does not necessarily mean the one in whose favor the judgment is rendered, or who is entitled to enforce it; the section applies as well to an advantage gained through fraud by the defendant in the judgment.

Lawless, Leslie & Botts for appellants.

Rousseau & Doty for appellee.

## DAVIS v. MURRAY.

Filed September 8, 1883. Appeal from Metcalfe Circuit Court. Opinion of the court by Judge Pryor, affirming.

Contract lien—Where a third person has paid off the purchase price of land for the vendee and stipulated, in the note executed to him by the vendee, for a lien upon the land to idemnify himself, the lien is as effectual, as between the parties, as if entered of record.

W. L. Porter and Grinstead & Basham for appellant.

Wm. Lindsay and Boles & Muncie for appellee.

## MILLER v. HAYNE'S ASS'EE.

Filed September 8, 1883. Appeal from Ohio Circuit Court. Opinion of the court by Judge Hines, reversing.

1. Husband and wife—Contract of married woman—Where a contract for the purchase of land, which has been executed, has been entered into by a feme covert and her husband for her benefit and the conveyance made to her, the contract is in fact the contract of the husband, although evidenced by the note of the wife alone, and the general rule that a feme covert can not enter into a contract which will bind either her or her estate does not apply.

2. A personal judgment against the wife under such a contract is wrong, because of her coverture, and a personal judgment against the husband is wrong because he has not stipulated for personal liability.

3. Vendor's lien—Where the vendee has accepted a conveyance and taken possession under it he can not resist the enforcement of the vendor's lien unless there is an absolute failure of title in the vendor.

W. N. Sweeney and Townsend, Massie & Fogle for appellant.

MADDOX, &c. v. AUSTIN.

Filed September 11, 1883. Appeal from Ohio Circuit Court. Opinion of the court by Judge Hines, affirming.

Lien—Estoppel—Appellants, who had a lien upon each of two funds for the payment of their claim, having prevented appellee from making his debt out of one of them by representing, evidently with the intention to mislead appellee, that they had a prior lien thereon, which they did not enforce, are now estopped to claim priority over appellee as to the other fund.

Walker & Hubbard for appellants.

McHenry & Hill for appellee.

CLARK v. FEICHEIMER, &c.

Filed September 11, 1883. Appeal from Christian Circuit Court. Opinion of the court by Judge Hines, affirming.

Partnership—Dormant partner—Appellees having sold goods to a merchant who was the only person known in the business, and attached his stock of goods to secure the payment of their claim, it was not enough to entitle appellant to an interest in the property attached that he was in fact a dormant or secret partner. He must bring the knowledge of that fact home to appellees prior to the time the credit was extended.

Boyd & Henry for appellant.

Wood & Wood and James D. Hays for appellees.

TAYLOR v. COMMONWEALTH.

Filed September 11, 1883. Appeal from Marion Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Criminal law—Evidence—Upon the trial of appellant for barn-burning it was legitimate for the Commonwealth to prove, for the purpose of showing a motive for the crime, that the party whose barn was burned was, on the day before the burning, summoned by, and did, accompany a constable to aid in the arrest of the appellant for another offense, and that he went to appellant's dwelling-house and made inquiry of his wife where he was.

2. Improper statements of attorney—It was improper for the attorney for the Commonwealth to state, in his argument to the jury, that he had witnesses present to prove appellant a man of notoriously bad character, but could not use them because appellant was afraid to put his character before the jury; but, as it appears that the court told the jury that the statements were improper, this court can not say that they were prejudicial.

J. D. Fogle and J. R. Thomas for appellant.

P. W. Hardin for appellee.

CAMPBELL v. GRAY.

Filed September 13, 1883. Appeal from Warren Court of Common Pleas. Opinion of the court by Judge Pryor, affirming.

1. Libel—To authorize a recovery in an action for libel the words must have been published with malicious intent, and it is with the jury to say whether or not they were so published.

2. Rejection of testimony—The court can not pass upon a question as to the rejection of testimony when it does not appear what the witness would have stated in answer to the questions propounded.

Beauchamp & Hinton for appellant.

Payne & Drake for appellee.

GREENUP COUNTY COURT, &c. v. CLIFTON.

Filed September 13, 1883. Appeal from Greenup Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Election for school commissioner—When an election for school commissioner has been held by the county court, composed of the county judge and justices, and the vote taken, it is too late, at a subsequent term of the court, or at the same term, to reconsider the vote.

2. Mandamus is the proper remedy against the county judge for refusing to permit the commissioner to qualify.

B. F. Bennett and L. T. Moore for appellants.

E. F. Dulin and Geo. M. Thomas for appellee.

GADDIE, &c. v. HODGES.

Filed September 13, 1883. Appeal from Hart Circuit Court. Opinion of the court by Judge Hines, affirming.

1. Mortgage—Mistake in name—The fact that in the body of a mortgage executed by husband and wife there was a mistake as to one of the wife's initials does not affect the validity of the mortgage as to her, the identity of the person executing and acknowledging the mortgage being clearly established.

2. Homestead—A mortgage which in terms purports to convey all the interest held by either husband or wife in the land mortgaged passes the homestead, as a deed with similar language would pass the fee.

Woodson & Macy for appellants.

WINTERSMITH, &c. v. FAIRLEIGH.

Filed September 13, 1883. Appeal from Larue Circuit Court. Opinion of the court by Chief Justice Hargis, reversing.

1. Exceptions to commissioner's report—An error which is palpable upon the face of a commissioner's report, and the judgment based thereon, will be corrected on appeal, although not specifically pointed out in exceptions to report.

2. Uncertainty in judgment—A decree directing the distribution of an insolvent estate should specify the names of creditors and the amount each is entitled to, or should state the whole amount due each and the per cent. to be paid thereon. A general reference to the commissioner's report, leaving its construction to the commissioner as to the names of the creditors and the amount to which each is entitled under it, relegates to the commissioner judicial powers which should be exercised by the court.

S. H. Bush for appellant.

W. H. Chelf, Wm. Johnson and W. Howell for appellees.

## GENTRY v. COMMONWEALTH.

Filed September 8, 1883. Appeal from Monroe Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

Appellate practice—Bill of exceptions—Where the rejection of testimony is assigned as error the bill of exceptions must show what answer the witness was expected to make to the question asked, in order to enable the court to pass upon the question.

Carr & Bullock for appellant.

P. W. Hardin for appellee.

## FITZGERALD, TRUSTEE, &c. v. MAUPIN'S ADM'R.

Filed September 15, 1883. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Pryor, affirming.

Usury—The exaction of more than the legal rate of interest, under the device of a commission to the agent securing the loan, is usurious.

Reid & Stone for appellants.

C. Breck for appellee.

## HOLMES v. HOPKINS.

Filed September 15, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Pryor, reversing.

1. Dower—Rent—In an action by a widow to recover dower in land aliened by her husband in his lifetime, she is entitled to rent only from the date of the institution of the action, and not from the death of her husband.

2. The vendee of the husband is personally liable for rent, although the held the land as trustee for others.

Weir, Weir & Walker for appellant.

Sweeney & Sons for appellee.

## HAYNES, &c. v. PAYNE, &c.

Filed September 15, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Judicial sale—Purchaser—The title of a purchaser at judicial sale is not affected by mere errors in the judgment, the court having jurisdiction of the subject matter and the parties.

2. In an action for the sale of trust property, for reinvestment, all of the beneficiaries being before the court, either as plaintiffs or defendants, the title passed to the purchaser.

G. W. Ray for appellants.

W. N. Sweeney & Son for appellees.

## McCARTHY, &c. v. PAYNE, &c.

Filed September 15, 1883. Appeal from Marion Circuit Court. Opinion of the court by Judge Lewis, affirming.

Pleading fraud—Where a party asks to have a judgment set aside after the expiration of the term at which it was rendered, upon the ground that it was obtained by fraud, an allegation of fraud in general terms is not suffi-

cient. The particulars of which the fraud consists, and the manner in which the judgment was fraudulently obtained, should be specified.

Russell & Russell for appellants.

Rountree & Lisle for appellees.

POPE'S EX'ORS v. SELVAGE & SNYDER.

Filed September 18, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Hines, affirming.

Title of executor—Parties to action—A testatrix, after making certain specific devises, provided that the remainder of her estate should be divided equally between her brother and sister, and directed her executor to sell such property as was not specifically devised. Held—That the legal title to the property devised passed to the devisees and not to the executor, and that the executor is not a necessary party to an action to subject the land to the payment of a claim against it for street improvements.

Elliott & Hemingray for appellants.

SOUTH FORK TURNPIKE ROAD CO. v. CASEY COUNTY COURT.

Filed September 18, 1883. Appeal from Casey Circuit Court. Opinion of the court by Judge Hines, affirming.

Justices of the peace raising county revenue—The justices of the peace, when composing, with the county judge, a court, are the financial guardians of the county, and may be authorized by the legislature to take any and all steps looking to taxation, the raising of revenue and the payment of claims against the county, and may, therefore, submit to the vote of the people the question whether the county court should be directed to subscribe to the building of turnpikes in the county, that being one step toward the raising of revenue to build pikes.

Hays & Stone for appellant.

John S. Vanwinkle for appellee.

HAEBERLIN v. McCURDY.

Filed September 18, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, affirming.

Right to use of passway—Where the right to the use of a passway belongs in common to the adjacent owners, the exercise of the right by any one of them must be in such a manner as not to destroy the right of his neighbor. Therefore, as the proof shows in this case that the appellant was in the habit of hauling over the passway in controversy with such heavily loaded wagons as to render the passway useless for ordinary vehicles, he was properly enjoined from using the passway in such a manner as to prevent its ordinary use by others.

Elliott & Hemingray for appellant.

Russell & Helm for appellee.

HAYDEN, RECEIVER v. SMITH.

SMITH v. SMITH.

Filed September 18, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Pryor, reversing.

1. Purchaser at judicial sale—Reversal of order confirming sale—Improvements—An order confirming a report of sale having been reversed on appeal, the purchaser, under the facts of this case, is entitled to compensation for

improvements, although made before confirmation; but as the rent and improvements approximate each other in value, they should be set off against each other.

2. The purchaser, if he so desires, should be substituted to the right of the original vendor to the extent he has paid for the land, and the land sold to pay the balance due the vendor, but, if the purchaser does not desire to be thus substituted, the land must be sold to pay the entire debt, and so much of it as has been paid by the purchaser, with interest, will be restored to him, and the balance paid to the vendor.

3. Misconduct of purchaser—Where the creditor has been misled by the purchaser, and remained away from the sale upon the faith of the purchaser's promise to bid the full amount of his debt, and the purchaser has failed to do so, the sale will be set aside.

Wilson & Hobson for appellant.

James Montgomery for appellee.

## LANCASTER'S ASS'EES v. JOHNSON.

## LANCASTER, &c. v. JOHNSON.

Filed September 20, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Hines, affirming.

Sureties—Failure of creditor to use collateral—The holder of collaterals is only required to act in good faith and to use ordinary diligence in making the collaterals available. If they are, with ordinary diligence, used to the extent of their value to reduce the debt, or if they are entirely worthless, sureties have no right to complain.

The failure of the creditor in this case to take personal judgment on lien notes held by him as collateral, the payor being insolvent, did not release the sureties in the note for the payment of which the lien notes were held as collateral.

J. C. Wickliffe for appellants.

Wm. Johnson and R. J. Brown for appellee.

## HENDERSON v. COMMONWEALTH.

Filed September 22, 1883. Appeal from Carter Circuit Court. Opinion of the court by Chief Justice Hargis, reversing.

1. Criminal law—Dying declaration—A statement of the deceased made, as the proof shows, when he was not impressed with the fact that he would die, was not admissible against the defendant as the dying declaration of the deceased, although he died in twelve hours after the statement was made.

2. Dying declarations should be confined to the act of killing and the circumstances attending it, and forming a part of the res gestæ; therefore, the declaration of the deceased that he had not had any trouble with the defendant was not admissible, nor was it proper to allow the witness to state that the deceased told him "to sell his corn, pay his debts and take care of his family."

3. Instruction as to self-defense—An instruction from which the jury probably inferred that they were required to believe that the defendant was in actual danger before they could acquit on the ground of self-defense was calculated to mislead the jury, who should be so plainly instructed on so vital a point as to leave no room for doubt, and although the giving of the instruction was not excepted to the court erred in refusing to instruct the jury, on motion of appellant, in express terms that it was not necessary that there should have been actual danger in order to give the right of self-defense.

4. Evidence—It was competent to prove the flight of the accused to escape arrest, and the fact that he shot the officer attempting to make the arrest.

G. W. Craddock and Thos. D. Theobold for appellant.

P. W. Hardin for appellee.

WATSON v. TURNER, &c.

Filed September 29, 1883. Appeal from Henderson Circuit Court. Opinion of the court by Judge Hines, reversing.

Sufficiency of levy on real estate—A levy upon an execution describing the property levied upon as "a house and lot of ground in the city of Henderson, being part of lot No. 8, corner of Third and Water streets," is sufficient to identify the property, and the title of the purchaser at the execution sale is good.

Sol. Sizemore for appellant.

A. T. Dudley, M. Merritt and Turner & Turner for appellees.

HALLORAN'S ADM'R v. L., C. & L. R. R. CO.

Filed September 22, 1883. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Chief Justice Hargis, affirming.

Error not assigned as ground for new trial not considered—The only ground for a new trial being that the verdict is against the law and evidence and the judgment is contrary to law, the appellate court can not inquire whether the trial court erred in giving the jury a peremptory instruction.

Fountain T. Fox for appellant.

Wm. Lindsay for appellee.

GILLESPIE v. SHARP'S ADM'R.

Filed September 27, 1883. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Pryor, reversing.

Vendor and vendee—Premature judgment on purchase money notes—A sold land to B, who executed his notes for the purchase money. A thereupon purchased land of C, and in payment therefor assigned to C the notes executed by B. In an action by C against B on the assigned notes, B pleaded that he ought not to pay the notes because A would not make him a deed to the land for which the notes were executed, and made A a party by cross petition. A set up facts showing that the title to the land C had sold him was defective, and prayed that the title be perfected before he should be compelled to part with title to the land he sold B.

Held—That it was error to render judgment in favor of C against B upon the assigned notes before it was determined whether or not the contract between A and C should be rescinded for want of title in C, as A would be entitled to the proceeds of the note against B if the contract should be rescinded.

C. H. Lee for appellant.

NORTON, &c. v. McGONAGILL, &c.

Filed September 27, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Pryor, reversing.

Lis pendens—A judgment decreeing the partition of real estate and providing for the execution of conveyances by the parties, and further providing that "this action is to be stricken from the docket," did not import.

that the case was to be stricken from the docket at the time the judgment was rendered, but when it should be executed, and, notwithstanding the judgment, the case was still a lis pendens.

Quigley & Quigley for appellants.

C. S. Marshall, Gilbert & Reid and John & J. W. Rodman for appellees.

McGILL, &c. v. CROMWELL'S GUARDIAN, &c.

Filed September 27, 1883. Appeal from Union Circuit Court. Opinion of the court by Judge Pryor, reversing.

1. Parol testimony to contradict writing—Parol testimony is not competent to contradict the boundary in a deed, in the absence of fraud or mistake, and, when either is alleged, it requires stronger proof than the mere declaration of the parties to contradict the plain stipulations of the written instrument.

2. Tenants in common—Partition—Improvements—Appellants having entered upon the land in controversy and made improvements in good faith, believing that they were the absolute owners, when, in fact, they were tenants in common with the appellees, the interest of the latter should be allotted them without interfering with the improvements, if this can be done, but if not, the appellants should be allowed to remove their improvements on the land allotted to appellees.

3. Rents—The tenant in possession is liable to his cotenants for rents, less the taxes paid, in the condition the property was before he improved it.

Ken Chapeze for appellants.

Cromwell Adair and S. B. Vance for appellees.

HALL v. CAMPBELL, &c.

Filed September 29, 1883. Appeal from Fleming Circuit Court. Opinion of the court by Chief Justice Hargis, reversing.

1. Dower—There can not be dower in lands of which the husband, during coverture, was not actually seized, or had not the right to an actual seizure.

2. One to whom land was devised with the condition that, if she died without issue, the land was to go to her brothers and sisters, attempted to convey the land, the deed being signed by her brother and his wife, but not acknowledged. In an action to enforce the vendor's lien, the brother of the vendor was made a party and confessed it to be his duty to convey, which the court adjudged he should do, thereby destroying all possibility of either actual seizure, or the right to actual seizure, during his life, and his wife, therefore, has no dower or contingent or potential right of dower, and her failure to acknowledge the conveyance presents no objection to the title.

3. Vendor and vendee—Rescission—The vendee having accepted from the vendor a general warranty deed, and failed to allege or prove that the vendor was insolvent, or that any fraud or misrepresentation had been practiced upon him in the sale and conveyance, is not entitled to a rescission.

4. Purchase by vendee of outstanding claim—Set-off against purchase money—The vendee is not entitled to set-off against the purchase money the amount paid by him for the contingent interest of the grantor's sister, as it appears that the grantor is still living, and until she dies without issue there can be no breach of warranty.

5. Breach of warranty—Where there is a breach of warranty, and the vendor is insolvent, the vendee may set off against the purchase money the

damages resulting from the breach, but unless the vendor is insolvent, or has practiced fraud in procuring the vendee to accept the conveyance, the vendee must look to the warranty.

6. Assignment of note by married woman—A married woman has no power or right to assign a note executed to her before marriage unless her husband gives her authority to do so, or assents to it, but where the payer, after the assignment of such a note, made a payment thereon to the payee and her husband, who executed their receipt therefor, the recitals of the receipt were notice to the payer of the assignment and ratification by the husband, and in a suit upon the note he can not rely upon want of title in the assignee, but is entitled to credit for the amount paid, as it will not be presumed he had notice of the assignment until after the execution of the receipt.

Davis & Cord for appellant.

HARROD, &c. v. JOHNSON, &c.

Filed September 29, 1883. Appeal from Franklin Circuit Court. Opinion of the court by Chief Justice Hargis, reversing.

1. Payment of purchase money for vendee—Lien—Homestead—One who has paid off for another the notes executed by him for the purchase money of land is entitled to a lien on the land to secure the repayment to him of the amount thus paid, and he does not waive this lien by taking a mortgage upon the land to further secure himself unless such was the intention of the parties; nor can the vendee claim homestead as against such a demand.

2. Failure to make wife a party to action to foreclose mortgage—A judgment foreclosing the mortgage in an action to which the wife was not a party did not affect her right to a homestead. She has the right to have the land sold again to satisfy the lien, as it may bring enough to do so and leave something with which to buy another home.

Frank Chinn for appellants.

John L. Scott and J. & J. W. Rodman for appellees.

GAVIN v. GAINES, &c.

Filed September 29, 1883. Appeal from Barren Circuit Court. Opinion of the court by Judge Pryor, affirming.

Advancement—The value of personal property given by a mother to her child, with the consent of her husband, the child's stepfather, can not be charged to the child as an advancement in the setttlement of the mother's estate; it is in law a gift by the stepfather.

Porter & Ritter for appellant.

Edward Badger and G. L. Everbach for appellees.

NOCK'S EX'OR v. GOODLOE, &c.

Filed September 29, 1883. Appeal from Fayette Circuit Court. Opinion of the court by Judge Pryor, reversing.

Fraudulent preference—Act of 1856—To bring a preference by an insolvent debtor within the act of 1856 it is not necessary that the preferred creditor should have knowledge of the insolvency of the debtor, or of the design to prefer.

Breckinridge & Shelby for appellant.

Buckner & Allen for appellees.

### LINDSEY v. WHITTLE, &c.

Filed September 29, 1883. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Hines, affirming.

Vendor and vendee—In an action to enforce a vendor's lien, the vendee claiming that the land conveyed was not that which he purchased, and that he did not accept the conveyance, in the absence of any allegation and of any proof that the vendee was mistaken as to what land was intended to be conveyed by the deed, which he drew himself, the deed in itself is sufficient evidence of the contract between vendor and vendee, and sufficient evidence of the fact that the deed was accepted by the vendee.

L. M. Hazelip for appellant.

L. J. Proctor for appellees.

## ABSTRACTS OF SUPERIOR COURT DECISIONS.

### COMMONWEALTH v. LANCASTER.

Filed September 7, 1883. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Bowden, striking from docket.

Docketing appeal—Transfer to proper court—An appeal must be first docketed in the court to which the appeal was granted, and if that court has not jurisdiction it can then be transferred to the proper court. An appeal granted to the Court of Appeals, and docketed in the Superior Court, is stricken from the docket regardless of whether the Superior Court has jurisdiction of the subject matter.

Finley Shuck for appellant.

Hill & Rives for appellee.

### HURST v. CASSIDAY.

Filed September 7, 1883. Appeal from Fleming Circuit Court. Opinion of the court by Judge Richards, overruling motion to docket.

Appeal docketed by consent—While the court will docket a case by consent whenever the transcript is filed, a motion to docket before the filing of the transcript is overruled.

W. H. Cord for appellant.

Cassiday & McCartney for appellee.

### COMMONWEALTH v. ADAMS.

Filed September 7, 1883. Appeal from Boyd Circuit Court. Opinion of the court by Judge Reid, reversing.

Indictment for receiving bribe at election—An indictment against appellee for receiving a bribe for his vote at an election, which shows that an election was held, who received the bribe, the person who gave it, the purpose of it, and that in consideration of the bribe the vote of the defendant was cast for a person who was voted for to fill the office of marshal, is sufficient.

Jerard Kinner for appellant.

### POWELL v. GRAY.

Filed September 10, 1883. Appeal from Boyle Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

A bastard can not inherit through his mother from her ancestors.

Vanwinkle & Rodes for appellant.

Breckinridge & McFerran for appellee.

LINVILLE &c. v. ROBERTS.

Filed September 10, 1883. Appeal from Rockcastle Court of Common Pleas. Opinion of the court by Judge Richards, reversing.

Interest and usury—Interest agreed to be paid as part of the price for land is not usurious, and where, in an action upon a promissory note, the plaintiff does not state the consideration of the note, the court will not presume that any part of the interest is illegal, but it is error to render judgment for more than the legal rate of interest after maturity, as in no case is such a contract valid.

Morrow & Newell for appellants.

DEPOSIT BANK OF GLASGOW v. MUNFORD, &c.

Filed September 11, 1883. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Rights of sureties—Subrogation—The lien given to appellant by its charter upon the stock of stockholders to secure all indebtedness from them is for the protection of the bank, in regard to which it can make any valid agreement; therefore, where a stockholder has become a debtor to the bank to the limit of his stock, the bank can make other loans on personal security alone, and sureties, not becoming such on the faith of the stock, have no right to it as a security.

2. A stockholder having executed to appellant two notes with the agreement that one was to be secured by his stock, and the other by personal security, it was error to adjudge that the sureties upon the latter note were entitled to have the value of the stock divided ratably between the two debts.

Porter & Ritter and Wm. Lindsay for appellant.

TONNSLEY, &c. v. MOBERLEY.

Filed September 12, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Judge Reid, reversing.

Judicial sale—Rents—A purchaser at judicial sale is entitled to rents from the date of the confirmation of the sale.

Geo. W. Ray for appellants.

R. W. Slack and E. W. Hines for appellee.

MONTGOMERY COUNTY COURT v. MITCHELL.

Filed September 12, 1883. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Richards, affirming.

Contract against public policy—Appointment to office—The appellant having the power to fill the office of county treasurer by appointment, an agreement by it to sell to appellee the profits arising from the office for a money consideration is against public policy and void.

White & Turney for appellant.

Reid & Stone for appellee.

PACE v. TOLLE.

Filed September 14, 1883. Appeal from Metcalfe Circuit Court. Opinion of the court by Judge Bowden, affirming.

Assignment of errors—An assignment that the court erred in refusing to grant a new trial is insufficient, as it does not specify the "particular error" on which the party means to rely.

S. H. Boles and Wm. Lindsay for appellant.

Leslie & Botts for appellee.

GROVER v. SMITH, &c.

Filed September 14, 1883. Appeal from Owen Circuit Court. Opinion of the court by Judge Reid, affirming.

1. Fraudulent preference—Where a mortgage is executed to secure an antecedent debt contracted upon the faith of an agreement to execute the mortgage, it is not a fraudulent preference within the act of 1856.

2. Where a mortgage executed to secure an antecedent debt, would otherwise operate as an assignment for the benefit of creditors, this can not be prevented by including in the mortgage simultaneously created liabilities, although they have been the moving cause to the execution of the mortgage.

3. Return of "no property"—An execution and return of "no property" from the quarterly court is not sufficient to give a court of equity jurisdiction to set aside a fraudulent conveyance.

George C. Drane for appellant.

D. W. Lindsey and J. H. Dorman for appellees.

CRUMP v. MOORE.

Filed September 14, 1883. Appeal from Warren Circuit Court. Opinion of the court by Judge Richards, overruling motion to strike from docket.

Failure to file assignment of errors—Motion to strike from docket—When an appeal has been granted by the clerk and there is a motion to srike from the docket for the failure to file assignment of errors, if the appellant tenders his assignment of errors the court will permit it to be filed, and overrule the motion to strike from the docket, but the case will not stand for hearing until the next term, unless by consent of the appellee.

Wright & McElroy and E. W. Hines for appellant.

John M. Galloway for appellee.

McKEE v. SMITH'S ADM'R.

Filed September 21, 1883. Appeal from Garrard Circuit Court. Opinion of the court by Judge Reid, reversing.

Commissioners in chancery—Reversal of order directing distribution—A commissioner having distributed a fund under the authority of a judgment which was not superseded, can not be held liable for paying to the distributees more than they were subsequently found to be entitled to upon a restatement of the accounts in accordance with the opinion of the Court of Appeals reversing the judgment of distribution.

Geo. R. McKee for appellant.

W. H. Miller for appellee.

WESTERN UNION TELEGRAPH CO. v. LYONS & CO.

Filed September 21, 1883. Appeal from Woodford Circuit Court. Opinion of the court by Judge Richards, dismissing.

Appellate jurisdiction—Void judgment—A judgment which the lower court had no jurisdiction to render is void, and can not be reversed on appeal until there has been a motion in the lower court to set it aside.

Maston & Rucker for appellant.

Porter & Wallace for appellee.

WEINGARTNER v. SPINKS.

Filed September 21, 1883. Appeal from Campbell Chancery Court. Opinion of the court by Judge Richards, reversing.

1. Lien for street improvements—In a proceeding to enforce an alleged lien for street improvements it must be made to appear affirmatively that every step necessary to the creation of the lien has been taken.

2. Pleading—Under the charter of the city of Newport, which requires that certain things shall be done before an ordinance providing for the improvement of a street is passed, and before any contract shall be entered into by the city for the improvement of the street, in an action by the contractor to enforce his lien the petition must allege that these things were done.

3. The city is not authorized to pass the ordinance levying the special tax in favor of the contractor until the mayor, engineer and chairman of the committee on improvements shall certify to the board of council that the improvement is completed and accepted, and the petition in a proceeding to enforce the contractor's lien should allege that this was done. An allegation that this fact was certified by the "Board of Improvements" is not sufficient.

4. Judgment—Description of land—A judgment for the sale of land should be so certain and specific in its directions to the commissioner, and in the description of the property to be sold by him, as will enable that officer to find the property without reference to any other paper or pleading in the cause.

E. W. Hawkins for appellant.

John S. Ducker for appellee.

GROGAN & KENNY v. ALLEN, &c.

Filed September 24, 1883. Appeal from Bath Circuit Court. Separate opinion of the court by Judge Richards, granting rehearing and reversing. Judge Reid not sitting.

1. Instructions foreign to issue—An instruction which presents for the consideration of the jury an issue not presented by the pleadings is misleading and erroneous.

2. In an action upon a promissory note the consideration, as alleged by the defendant, being admitted by the plaintiff by the failure to deny it was error to instruct the jury to find for the plaintiff if they believed something else was the consideration, the instructions being foreign to the issue made by the pleadings.

Reid & Stone for appellant.

J. J. Nesbitt and Gudgell & Son for appellees.

TAYLOR v. ARMSTRONG, &c.

Filed September 24, 1883. Appeal from Franklin Circuit Court. Opinion of the court by Judge Richards, affirming.

1. Sales of personal property—Failure to deliver—In an action against appellant for failing to deliver to appellees distillery slop, which they allege he sold to them "to the extent of the capacity of his distillery, which was 1,400 gallons per day," he can not excuse his refusal to deliver the slop by saying he did not run, nor bind himself to run, his distillery. The sale of personal property necessarily implies that the seller will have to deliver at the proper time.

2. Assignment of errors—Such assignment of errors as that "the court erred in giving instructions to the jury," and that "the court erred in refusing to grant the defendant a new trial," are too general to be considered.

3. Instructions—The court properly refused to instruct the jury to find for the defendant unless they believed from the evidence that "the contract, as alleged, and all the terms thereof" were agreed upon between the plaintiffs and defendant. The court should select from pleadings and place before the jury, by its instructions, the material issues.

Wm. Lindsay and Alvin Duvall for appellant.

Ira Julian and O. D. McManama for appellee.

P. & E. R. R. CO. v. LETCHER.

Filed September 24, 1883. Appeal from Ohio Circuit Court. Response by Presiding Judge Bowden to petition for rehearing.

1. Special verdicts—A verdict for the plaintiff, or for the defendant for an amount named, subject to the opinion of the court upon facts specially found, is not a general verdict according to the Code.

2. The verdict must be special in every case where a party demands it. The special verdict consists in answers to written questions, and where the question to be answered requires a survey of the whole case the jury ought to consider the whole case.

3. Where the award is not limited to the value of the subject-matter, but is just what the jury decide should be given upon an intelligent, fair consideration of all the facts under the instruction of the court, that award is necessarily a response to all the facts and all the law which go to make up the case, but the verdict in such a case may, nevertheless, be special.

4. Whether the jury are directed to return a general or a special verdict, questions of law will arise in the process of investigation requiring special instructions from the court. Where the jury are to find as a fact whether the defendant was guilty of willful neglect they need to be told by the court what, as matter of law, constitutes such neglect.

Holmes Cummins and P. H. Darby for appellant.

Walker & Hubbard for appellee.

RANSOM, &c. v. MILWARD, &c.

Filed September 26, 1883. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Husband and wife—Debts of wife contracted before marriage—At common law the husband was, during the marriage, personally liable for debts contracted by his wife before marriage, and both he and she could be taken and imprisoned for the debt. The statute does not relieve him absolutely from personal liability, but only sub modo; he remains personally liable to the extent of the value of personalty received by him as husband.

2. Form of judgment against husband—A judgment against the husband for the debt of the wife, contracted before marriage, should go no further than to allow a seizure of the very things the husband may get, or may have gotten, from the wife, unless the court has decided, on an allegation of the creditor, that enough property has been received to make the husband's own estate liable, and in that event a personal judgment in the ordinary form may be rendered against the husband. It was error in this case to render a personal judgment against the husband for the debt of the wife, providing that the husband should not be liable "except to the amount or

value of whatever he may have received by his wife, independent of her real estate." Such a judgment leaves it to the sheriff to determine the personal liability of the husband.

3. A married woman can not plead her existing marriage as a defense to a debt contracted before marriage.

4. Implied promise—It is a general rule that when services are rendered by one person at the request of another a promise to pay for such services is imputed to the person making the request. Whether this rule applies to a request of an undertaker to bury the dead—quere?

Breckinridge & Shelby and Mulligan & Beauchamp for appellants.

D. G. Falconer for appellees.

SLACK v. LONGSHAW.

Filed September 24, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Richards, dismissing.

Assignment of errors—The extension of time for filing a bill of exceptions does not operate to extend the time for filing assignment of errors, which must still be filed within ninety days after judgment.

James Montgomery for appellant.

Montgomery & Poston for appellee.

CABELL v. MILLER.

Filed September 26, 1883. Appeal from Adair Circuit Court. Opinion of the court by Judge Richards, reversing.

Judicial sale—Resale at risk of purchaser failing to execute bond—In an action to enforce a vendor's lien a judgment was rendered directing a sale of the land to pay the plaintiffs, the court reserving the question as to which of two parties claiming the land was entitled to the surplus proceeds, if any there should be. One of the claimants of the land became the purchaser, but being unable to execute bond a resale was ordered. At the second sale the other claimant became the purchaser at $800 less than was bid on the first sale, but enough was realized on the second sale to pay the plaintiffs. The second purchaser thereupon had a rule issued against the first purchaser to show cause why he should not pay her the difference between the bids at the two sales.

Held—That as between the creditors and the first purchaser the chancellor would have had the authority to order the property resold at the risk of the purchaser and make him pay the difference had it not brought enough to pay the debts, but as between the first purchaser and the second, who claims to be entitled to the surplus proceeds, the chancellor will not hold the first purchaser liable, especially as to do so in this case would be to give the second purchaser not only the land but the $800 additional. Moreover it does not appear that the question as to which of the two claimants is entitled to the surplus proceeds was ever passed upon.

H. C. Baker for appellant.

A. Duvall for appellee.

MARTIN'S ADM'R v. DONALDSON.

MULLINS, &c. v. SAME.

Filed September 26, 1883. Appeal from Carroll Circuit Court. Opinion of the court by Judge Reid, affirming.

1. A motion for judgment on a claimant's bond, under the present Code, may be heard and determined upon, or without, written pleadings.

2. Separate estate—No particular form of words is essential to create a separate estate in a married woman. It is only necessary that the manifest

intention of the language employed be to exclude the husband and to confer upon the wife the exclusive property in the thing conveyed.

3. Husband and wife—Profits of wife's business—While the goods and profits of business carried on by a married woman can not be converted into separate estate by the mere assent of the husband, or even by an express agreement, but can only be done by a court of chancery and by the husband's consent, when necessary thereto, given of record in the court, yet the proceeds of a wife's general estate may, by permission of the husband, be set apart for her separate and exclusive use, but his intention to do so must be manifested by a distinct act, unequivocal in its nature.

Winslows for appellants.

Geo. C. Drane for appellee.

COMMONWEALTH v. GARRISON.

Filed September 19, 1883. Appeal from McCracken Circuit Court. Opinion of the court by Judge Reid, reversing.

1. Criminal law—Suffering gaming—Evidence—Upon the trial of appellee under an indictment against him for permitting gaming in a house under his control, the question under investigation being purely one of fact as to who had control of the premises when the offense was committed, the evidence should have been confined to acts of ownership or control, and general reputation or representation on this subject was inadmissible.

2. Allegation of time—Time is not a material ingredient in the offense, and the statement of the time in the indictment is not material further than as a statement that the offense was committed before the finding of the indictment; therefore, any evidence that illustrated the issue as to who controlled the premises at the time the offense was committed, covering the period of five years anterior to the finding of the indictment, was competent.

P. W. Hardin and C. H. Thomas for appellant.

WILSON v. OLDHAM.

Filed September 19, 1883. Appeal from Estill Circuit Court. Opinion of the court by Judge Reid, affirming.

Homestead—The homestead of a debtor can not be sold for debt subject to his right of occupancy. The exemption provided by the statute is not an exemption of the bare right of occupancy, but an exemption of the homestead itself, which the debtor may dispose of as he chooses. It is only where the homestead of the debtor is continued for the benefit of his widow and children that it can be sold for the payment of his debts, and then the sale must be made subject to the right of occupancy of the widow and children.

H. C. Lilly & Son for appellant.

CITY OF FRANKFORT v. WEITZEL.

Filed September 19, 1883. Appeal from Franklin Court of Common Pleas. Opinion of the court by Judge Richards, reversing.

Judgment against garnishee—Where a garnishee is made a defendant for the purpose of obtaining a personal judgment against him, the cause of action against him must be alleged with the same particularity as if he were being sued thereon by the principal debtor. An allegation of the indebtedness of the garnishee, without stating the facts constituting the indebtedness, is not sufficient to authorize a personal judgment against him.

Hugh Rodman for appellant.

John L. Scott for appellee.

## BOOK REVIEW.

GREAT OPINIONS BY GREAT JUDGES, with an introduction, notes, analyses, etc., by William L. Snyder, of New York Bar, pp. 792, Baker, Voorhis & Co., 66 Nassau street, New York.

This volume is interesting to two classes of readers: To the student, because it will introduce him to many of the great principles of the law in their application to particular cases, and will thus give him a clearer idea of those principles than if he heard them abstractly stated; to the practitioner, because it passes in review the principles with which he has been so long familiar, and enables him to admire the accuracy with which those great precepts of justice are laid down in their fullness, and yet with proper limitations, by the enlightened judges who first perceived them.

Opinions are given from the times of Coke, Mansfield and Hardwicke to Marshall, Story and Curtis. Thus in Brook v. Galley, page 53, Lord Hardwicke defines the rule governing infants' contracts to be that an infant is bound to pay for necessaries furnished him, but he is not bound for any price he may have promised, but only what the necessaries were reasonably worth. And though he may have ratified his purchase after coming of age by giving his note, equity will relieve against it when it has been executed so soon after infancy that unfair advantage was presumably taken of him. This stands to-day, 140 years after it was delivered, as a full and just statement of the law on the subject. So in Gratwick v. Jumper, page 64, he establishes the proposition that equity will relieve against a contract made under a mistake of fact. Lord Mansfield appears in several opinions on commercial law, which he did so much to make a science of. In Holman v. Johnson, page 97, plaintiff, a Scotch merchant, sold defendant, an English smuggler, a lot of tea, deliverable in Scotland, and afterwards, in a suit for the price of the tea, defendant set up the illegality of the contract; that the tea was intended to be smuggled into England, and plaintiff knew that fact. But Lord Mansfield read defendant a lecture, and told him that the objection that a contract was illegal or immoral came with an ill grace from defendant, and the objection was never allowed for his sake,

but in the interest of public policy, which he had the advantage of. He then states that a contract that is valid where made is valid everywhere.

In Yates v. Lansing, page 201, Chancellor Kent establishes the great principle that a judge of a superior court, having jurisdiction of the subject-matter and the parties, is not personally liable for any error he may commit, and even if he act corruptly he can not be sued civilly until he has been convicted of corruption by impeachment.

C. J. Marshall is represented in McCulloch v. Maryland, page 267, where the state of Maryland claimed a right to impose a tax on a branch of the United States Bank (chartered by congress) and doing business in the State. The opinion is admirable. It holds that Congress, having certain enumerated powers and the power to enact laws necessary to carry those powers into effect, has, as a consequence, the right to establish a National Bank. And that no State could tax such a bank, because the power to tax would involve and carry with it the power to embarrass, or even to destroy, the authority of the central government. On the subject of privileged communications to attorneys, there is an opinion by Lord Brougham, in Greenough v. Gaskell, page 328. He holds that a client may be compelled to disclose everything which has passed between himself and his attorney, but the attorney is protected and can not be made to disclose anything. C. J. Gibson, of Pennsylvania, appears in DeChastellux v. Fairchild, page 421, where it is held that granting a new trial is a judicial and not a legislative act, and a statute authorizing a new trial in a particular case is void. And in United States v. McGlue, 568, Judge Curtis lays it down that if a person suffering from delirium tremens commit a crime the law does not hold him responsible, but if he commit the crime while he is intoxicated he is responsible. Besides these there are many other very interesting opinions by Lord Holt, Stowell, Campbell, C. J. Taney, Shaw, Chase, Judge Black, Cooley, Sir James Fitz James, Stephens and others. But Lord Eldon, Ellenborough and Thurlow are wanting, and only one opinion of C. J. Marshall's is given, while C. J. Parsons appears in no less than six. The type is large and clear, and the opinions divided according to subjects into paragraphs headed by "catch lines" in bold letters, so that reading is made easy and convenient. Mr.

Snyder, the annotator, prefaces the opinions with a brief biography of the judge, a summary of the facts, and an analysis of the points decided. In his preface he traces the growth of the law, and makes the curious statement that the ecclesiastical courts on the continent during the middle ages sometimes occupied their time in excommunicating bugs, flies, leeches and caterpillars, and where the animal was capable of seizure his body was brought into court, counsel was appointed and the trial conducted with due solemnity.

We can not close the book without noticing the curious case of DaCosta v. Jones, page 107, brought upon a wager made as to the sex of the Chevalier D'Eon. The Chevalier had asumed female dress while acting as a spy in Russia, but on coming to England appeared as a man, frequented the races and gambling halls. At this time the bet was made between two of his acquaintances. He refused to have anything to do with it, and left for France, where he again assumed female attire and remained until the Revolution drove him to England again, where he lived as companion to a respectable lady up to his death in 1810. Upon a post mortem examination he was found of the male sex. In relation to the wager Lord Mansfield held that though wagers are enforced by the common law this could not be because it involved the taking of indecent eivdence.

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## PERSONAL.

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Judge B. F. Buckner, of the 10th Judicial District, has resigned his seat on the bench and removed to Louisville, where he is to resume practice.

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It is expected that Judge Hargis, of the Court of Appeals, will remove to Louisville and commence practice there upon the expiration of his present term.

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The visit of Lord Coleridge to Louisville will be pleasantly remembered by all who met him. His Lordship was born in 1821; educated at Eton and Oxford; was called to the bar in

1842; appointed Solicitor General in 1868; Attorney General in 1871, and Chief Justice of the Common Pleas in 1872; but upon the consolidation of the Exchequer and Common Pleas Court with the Queen's Bench and the death of Lord Cockburn he was appointed to the presidency of the three courts under the title of Lord Chief Justice of England. He is a highly educated man and is said to be an eloquent speaker. His manners are genial and unpretending, such as are always found in the best bred people. He was Attorney General during the Tichborne case, which lasted 188 days, and out of it he is said to have made enormous fees. His speech at the dinner given him in Louisville was more pointed than such addresses usually are. His remark that an aristocracy existed here as well as in England, and that it must exist in every community, however democratic its opinions, is undoubtedly true. He ventured to add (at least so he was reported) that it was superior to the aristocracy of his own country. He is to be given a grand public reception in New York on the 11th inst., and will soon after sail for England. The following are taken from his speech at the St. Louis Bar reception:

"For myself, accustomed as I have long been to the criticism of English writers, I have some difficulty in recognizing in the far too flatering portrait given in this address any traces of the features of the original with which I have been so long familiar in the severely truthful mirror of the English newspapers. (Laughter.) But the truth obliges me to say that, as we all know, distance lends enchantment to the view; and as the English portrait painters are much nearer to their subject so it is tolerably certain—especially as one knows that from their omniscience anything like error, anything like personal prejudice, anything like hard feeling, is, from the necessity of the case, uniformly absent (laughter)—it is quite certain that the English portrait will be more correct than the American." (Laughter.)

And this: "England is in a certain sense the mother, and America is the child. (Applause.) And the mother, like other mothers, suffered many pangs and much sorrow at the birth of her child. (General applause and laughter.) But now all those have passed away, and 'she knoweth no more sorrow,' for the joy and pride with which she looks upon the greatness and glory of what she has brought forth." (Loud and continued applause.)

THE

# KENTUCKY LAW REPORTER AND JOURNAL

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## CURRENT TOPICS.

In 1880 there were 64,000 lawyers in this country, 64,600 preachers and 85,600 doctors. The lawyers increased over 24,000 in the ten years between 1870 and 1880, and the preachers about 20,000.

Mr. Shirley, of New Hampshire, in a paper read before the American Bar Association, says, speaking of the multiplicity of the Reports, that in the beginning of this century they were all contained in two small volumes, now they number 3,100, and are increasing at the rate of 100 annually. Fortunately he does not think the English decisions are any longer of much importance, being founded, as so many of them are, on local statutes, such as the employers' act, the common law procedure act, the bankruptcy act, etc.

Mr. Lawson, of Georgia, President of the Association, in his lengthy review of recent legislation in the different States, points out that Nevada in her new Constitution proposes to disfranchise all voters convicted of selling their votes; that Col-

orado has passed an act prescribing the manner of conducting primaries and counting the votes, and has fixed the number of jurors in civil cases at six, unless the counsel agree on a less, or the court requires a greater, number; Missouri has relieved her Supreme Court from the necessity of preparing or filing written opinions except in such cases as involve a new principle. North Carolina has passed a law against the carrying of concealed razors. The address concludes as follows: "The real trouble with us to-day is not mere love of money, as a possession and a treasure, for the pursuit of wealth is not only a right, but often a duty, and the use of it, when acquired, a great pleasure and high privilege, but it is the self prostration of society before it as a dignity, a principality, a power. In this worship is often surrendered talent, learning, every high and noble aspiration, and even the gentler graces and more refined charities of life. Against this deification and asborbing power of wealth what stronger bulwarks can be interposed than the associated resistance and the example of an intellectual and learned profession, powerful in influence, intimate and controlling in its ncessary connection with every variety of human affiairs; trained to vigorous and independent thought and effective speech. If it but dare assert its dignity and character there is no social agent which has half its power to curb and reform society. But to accomplish this we must make no terms with dishonor, for demoralization often comes not so much from joining in the outright commission of sin as from the halting, unmanly acquiescence by which we condone it."

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Professor Wayland, President of the American Social Association, recently read a paper before the society against capital punishment. He states that in 267 trials in Massachusetts and Connecticut for murder in the first degree there were 42 convictions of murder in the first degree and 68 convictions of murder in the second degree, while in 300 trials for burglary there were 273 convictions. In Rhode Island, where the death penalty does not prevail, in one county out of 27 trials for murder there were 17 convictions. It was recenty stated in the

House of Commons that in the last 20 years the convictions of murder were 49 per cent. and of all other crimes 76 per cent., from these facts it was argued that there is an increasing aversion to capital punishment, and that with rare exceptions juries refuse to enforce it. Professor Wayland adovcates life sentences and a constitutional prohibition against pardon until, in the court in which he was conivcted, the prisoner is shown innocent. In this connection it may be remarked that the death penalty, which was a short time since abolished in Maine, has been restored.

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In his recent farewell address, delivered at a public reception given him in New York on the 11th, ultimo (and in all his other late speeches), Lord Coleridge has shown himself to be a most animated, dignified and polished speaker, though in referring to himself he adopts a style of such utter self-depreciation as is quite amusing, and is certainly not sincere. For instance, he says: "I have not, and can not have, the slightest pretense to answer for the intellect, scholarship, oratory or law of my country." This, of course, is mere hyperbole, and the contrary of it is the truth, for a Chief Justice of England can make every pretense to "answer" for her law, and a speaker so ready and animated may justly claim to represent her oratory, and as for scholarship his Lordship has frequently shown his powers in that line to be considerable, and further all who talked with him or read his speeches know that he is far too acute and observing not to discover and appreciate his superiority in these respects. But aside from this he has shown himself a most intelligent spectator and observer among us, and his words bear the impress of sincerity when he so earnestly declares his sympathy with the aims—the best and loftiest—of this country. He is by this time at home and sitting in the familiar precincts of his own court, but his visit here will be pleasantly remembered by all who met or heard him. He is certainly the most interesting Englishman who has been in this country for years. His address in New York is given on a subsequent page of this number.

## NOTES OF CASES.

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In Barclay v. Smith, Illinois Supreme Court, May, 1883, it is held that a certificate of membership in a Board of Trade (of Chicago) is not liable to be subjected to the payment of the owner's debts. It is a mere privilege and not property. But the United States Circuit Court in New Jersey, in the matter of Werder, March, 1883, held that a membership in the Produce Exchange of New York was liable for the debts of its owner. See also Hyde v. Woods, 94 U. .S, 523.

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Where a marriage has been duly solemnized according to the local law of the place of solemnization, the domicile of the wife follows and becomes the same as that of the husband, and, therefore, when an Englishwoman married in England, according to English law, a foreigner, a Scotchman, and went to reside with him in Scotland, it is held that the courts of the country of the husband's domicile had authority to dissolve the marriage for a cause for which a divorce could not have been obtained in England, and that such divorce would be recognized in England. (Harvey v. Farnie, 48 L. T. Rep. (N. S.), 273, House of Lords. See also McCarthy v. DeCaix, 2 Russ. and My., 614, s. c., 2 Cl. and F., 568; Geils v. Geils, 1 Macq., 254; Maghee v. McAllister, 3 Ir. Ch., 604; Warrender v. Same 2 Cl. and F., 488; Lolly's Case, 2 Cl. and F., 567; Tovey v. Lindsey, 1 Dorr., 117; Niboyet v. Same, 4 P. Div., 1; Pitt v. Same, 4 Macq., 627.)

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In People's Bank of Wilksbarre v. Legrand, Pennsylvania Supreme Court, April, 1883, it was held that where the principal on a note payable to a bank has funds on deposit in the bank after maturity sufficient to pay the note the failure of the bank to appropriate the deposit to the payment of the note does not discharge an endorser. "It is contended," says the court, "that these funds being within the power of the plaintiff an obligation arose to appropriate them to the payment of

the note, as in favor of the endorser, and not being done the latter was discharged. We do not think so. While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and, therefore, in an action by the bank against the depositor on a note upon which he is liable the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an endorser of the depositor. A bank deposit is different from an ordinary debt in this, that it is constantly subject to the check of the depositor. And the convenience of the commercial world requires that this character should be preserved to it." See also Voss v. German American Bank, 83 Illinois, 599; Martin v. Mechanic's Bank, 6 Harr. and Johns., 235; National Bank of Newberg v. Smith, 66 N. Y., 271. But as to the contra, McDowell v. Bank of Wilmington, 1 Harrington, 369.

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In United States v. Singleton, on certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York, the United States Supreme Court holds the first and second sections of the Civil Rights Act, passed March 1, 1875, unconstitutional. The court says that the act is not authorized by the fourteenth amendment to the Constituion because that amendment merely prohibits certain legislation by the States and does not authorize direct legislation by Congress upon the prohibited matters, but only such legislation as is necessary to counteract the effect of that prohibited to the States. And that the thirteenth amendment does not authorize the act because that amendment only relates to and abolishes slavery, consequently it is no infraction of it to refuse any person equal accommodations and privileges of an inn, theatre or railway car; however it may violate his legal rights it does not impose on him any badge of slavery or involuntary servitude.

But the act is held constitutional so far as it applies to the District of Columbia and the territories. Harlan, J., dissents.

The decision has created a great stir among the colored people, and brought all their orators, admirers and defenders to the front. But the decision need not to cause so much surprise in this district at least, for the same thing was held by Judge

Barr last year (May, 1882), in the case of Smoot v. Kentucky Central Railway Company, 2 Ky. L. J., 182, where a colored woman brought suit under the above act against the defendant railway company, to recover damages for refusing to allow her to ride in the car provided for white ladies, and forcing her to go into an inferior car reserved for gentlemen. Defendant demurred to the petition on the ground that the act was unconstitutional.

The court held that the fourteenth and other amendments are limitations upon the power of the States, and to some extent an enlargement of the powers of Congress. But the enlargement of those powers is for the purpose only of enforcing the limitations placed on the State. If, therefore, a State has not attempted by its laws or agencies to overstep these limitations, no case arises for the exercise of the power given in the amendment referred to. No law exists in Kentucky authorizing the defendant, or any other corporation, to make distinctions in the accommodations offered to passengers on account of their color. The act, therefore, since it does not seek to counteract a State law, but is an attempt at direct legislation, is unconstitutional, and the demurrer must be sustained.

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Hyde v. Wab., St. L., &c., Railway Company, Iowa Supreme Court, June, 1883, was an action brought by an administrator to recover for injuries to his intestate which resulted in the death of the latter. The action was brought in Iowa, and the petition states that the death of decedent occurred in Missouri, through the negligence of defendant. Defendant demurred to the petition on the ground that no statute of Missouri by which an action in such a case survived to the personal representative was pleaded. And the court held that the statute should have been pleaded, because if the act complained of was done in Missouri and no statute there created a liability, the action not being maintainable at common law at all, no liability would exist anywhere. And though there was a statute in Iowa, where the suit was brought, providing that such causes of action should survive to the personal representative notwithstanding the death of the person entitled to same, that could not help the plaintiff in this case, because recovery under

it (by which the damages would go to the personal representative) would be no bar to another suit in Missouri for the very same injury under the statute of that State (by which the damages would go to the heirs). This same question came up in this State in Taylor's Adm'x v. Pennsylvania Co., 78 Kentucky, 348, where the administratrix brought suit here to recover for the death of her instestate which occurred in Indiana, and was caused by defendant's negligence. The action was based on an Indiana statute, but the court held that statute could have no extra territorial effect, and could not be the ground of action for an administratrix appointed in Kentucky and suing here, for she has no rights and powers beyond the jurisdiction of the government under whose laws she received her appointment. But see in Dennick v. Railroad Co., 103 U. S., 11, a very interesting opinion by Miller, J., holding the contrary to Taylor v. Pennsylvania Co., supra.

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## I.

## THE LAST YEAR'S WORK IN THE COURT OF APPEALS.

### VOLUME FOUR KENTUCKY LAW REPORTER AND JOURNAL.

This volume contains so many cases of interest involving the application of general principles and the construction of the Code and Statutes that it is difficult to choose from among them, but the following seem to be the most interesting and important:

In Williams, Rec'r, &c., v. Thompson, &c., page 9, it is held that when the record on appeal is defective by reason of a clerical misprision, time will be given to have it corrected and brought up by certiorari. In City of Lexington v. Auger, jr., &c., page 23, the city is held liable for injuires to plaintiff caused by his falling into a hole in the sidewalk, of which the city had notice. In Story, &c. v. Harbison, page 54, it is held money collected by an administrator and improperly applied, through mistake, to the debts of the estate, renders the admin-

istrator personally liable therefor, and the land descending to the heirs can not be subjected. In Hawkins v. Ragsdale, page 184, a foreign divorce bars all claim to dower, though it does not in other respects affect the rights to property in this State. In City of Newport v. Berry, page 185, it is held where a city charter provides that the city shall pay the county judge such reasonable sum as the council may annually determine, and the council fails to fix the sum, the court can not do it, because the duty is in its nature judicial, and must be determined by the individual judgment of the council. In Baird, &c. v. Bruning, &c., page 206, the subject of separate estate is discussed. Under the earliest (or one of the earliest) acts on the subject, that of February 23, 1846, it was held that almost any contract of a married woman would bind her separate estate. Her endorsement of a note, or becoming surety on it, when she had none but separate estate, bound that estate, although the contract embraced no express or necessarily implied promise that her separate estate should be bound. But it was found that, controlled by this doctrine, her separate estate was often diverted from the purpose for which it was created, and became the prey of the husband's recklessness. This statute was accordingly repealed, and the Revised Statutes (volume 2, page 28) enacted, providing that the estate should not be sold or encumbered, except in chancery, and then for purposes of investment only. But this was found so cumbersome and costly as almost entirely to deprive her of the use and enjoyment of her property. So the law was again changed, and General Statutes, chapter 52, article 4, section 17, enacted, allowing her to sell and convey with the consent of her husband, but making her interest the same in the proceeds as in the original estate. Under this statute it is held that her separate estate is liable for her debts created for her own use and benefit; that she may mortgage it for her own debt (McGill, &c v. Mercantile Trust Co., &c., post, page 927), but not for his debt. (Hirschman v. Brashears, &c., 79 Kentucky, 258.)

In Beatty, &c. v. Dudley, Assignee, &c., page 212, it is held that the mere collection of a debt or exacting of indemnity for suretyship, although the debtor is known to be insolvent, is neither fraudulent nor hinders nor delays creditors. In Garland v. Rice, page 254, the contract of a lunatic is held void-

able, not void, and if the parties can not be placed in statu quo the contract will not be disturbed if made in good faith and without notice of insanity. If the lunatic's deed is rescinded the purchase money must be refunded, and the grantee will be exempt from rents. In Loarn v. City of Louisville, page 257, a statute is held not repealed by implication unless there is such positive repugnancy between its provisions and those of a subsequent statute that they can not be consistently reconciled. In Henry v. Koch, jr., &c., page 282, A and B bought two houses adjoining each other and separated, at the time of the purchase, by a wall which was not a party wall, and which in part stood entirely on A's lot. A undertook to pull down the wall. Held, That B might have an injunction to prevent him, on the ground that the houses must be taken as they were at the time of the conveyance, and the rights of the parties must be determined by the condition of the property at that time. In Duke's Heirs v. Duke's Devisees, page 293, it is held that the husband and wife may convert her general estate into separate estate by conveying it to a trustee to be held as separate estate. And that a decree of court making a married woman a feme sole does not extend beyond the existing into a subsequent marriage. In Jones, &c. v. Higgins, page 390, it is held that one for whose benefit a contract is made may maintain an action on it although not a party, but the parties to the contract had the right to change or abandon it at any time before it is accepted by the person for whose benefit it was made. In National Bank of Stanford v. Reed, &c., page 346, a reply which is inconsistent with an allegation of plaintiff in a former suit made part of the petiton is bad. The foregoing are chosen from cases decided by the court between July and January.

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## KENTUCKY COURT OF APPEALS.

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## HOUNSHELL, &c. v. CLAY FIRE AND MARINE INS. CO.

(Filed October 9, 1883.)

1. Separate estate—Where a married woman borrows money to pay for land conveyed to her as her separate estate and mortgages the land therefor, she is bound by the mortgage, though the money was paid to her husband and was not all used in paying for the land, it appearing that he acted in the matter as her agent.

2. Mortgagee—Rents—The mortgagee is not entitled to the rents of the mortgaged land unless they are expressly included in the mortgage or he shows a state of case provided for by Civil Code, sections 298-302.

3. Guardian's agreement—The guardian can not by his agreement with reference to rents so dispose of the infant's rights therein (which were superior to the mortgagee's) as to postpone them to the mortgagee's.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Hargis.

In 1869 A. S. Berry sold, and with his wife conveyed, to Mrs. Lucy S. Hounshell a house and lot to her own separate and exclusive use.

The consideration being $6,000, of which $1,500 was paid, leaving the residue to be paid in installments, with a lien reserved in the deed to secure their payment.

By an agreement with the appellee, the Clay Fire and Marine Insurance Company, and A. S. Berry, in 1872, Mrs. Hounshell and her husband, for the purpose of paying the purchase money to Berry, executed a mortgage and two notes therefor to Berry, who assigned the first one, which was for $3,000 and secured by prior lien in the mortgage to the appellee, and the appellee paid to Hounshell and wife that sum less the interest. The money was delivered to the husband, who was transacting the business for his wife, and he paid $2,000 thereof to Berry, on the balance due him for the purchase money as evidenced by the record mortgage note for $2,280 held by Berry. It does not clearly appear what the husband did with the remainder of the loan procured from appellee.

The lien retained in the deed from Berry to Mrs. Hounshell was released on the margin of the record containing it. The appellee refused to loan Hounshell the money unless the lien was released, so as to give it priority over Berry's debt for the remainder of the purchase money, and for this purpose only was the form of the lien released, the agreement being that the mortgage should be substituted for the original lien. The loan was substantially to Mrs. Hounshell for the puprose of paying for the identical porperty which she held as separate estate, and by the express terms of the mortgage executed and duly acknowledged by her, was pledged and bound for its payment to the appellee.

These facts bring this case within the principle of the decisions in the cases of Baird, &c. v. Bruning, &c., 4 Kentucky Law Reporter, 206, where it is held that the wife may bind her separate estate, or its proceeds, by express contract or necessary implication, for the payment of such debts as she may create, or the discharge of any contract she may make for her own use and benefit; and the latter case of Breese, &c. v. Smith, &c., MS. Opinion October 12, 1882, 4 Kentucky Law Reporter, 347, where the same doctrine is approved.

Mrs. Hounshell created the debt to the appellee for her own use and benefit, and applied its proceeds largely to the payment for the house and lot which she bound by the mortgage to secure, and which her children, who are infants, she being dead, now claim as exempt from appellee's debt on the ground that it was created by the husband, and that she was his surety. There is no foundation in fact for such a claim. Although the husband used $700 of the loan he was the agent of the wife, acting for her, and if he failed to apply the whole loan as she wished him to do the consequences of the default can not be visited upon the appellee. The judgment subjecting the house and lot to the payment of appellee's loan must, for the reasons given, be affirmed.

But it appears that pending the suit to foreclose the mortgage, by consent of the guardian for the appellants, who are infants of tender years, the house and lot were placed in the hands of a receiver, and that considerable rents accrued and are now in his hands.

The infants claimed the rents, but the court, thinking the agreement binding, refused to allow their claim. Of this judgment they complain, and, we think, justly. According to the principles of the case of Collins, &c. v. Richards, &c., 14 Bush, 621, the appellees were not entitled under their mortgage to the rents, as it does not embrace them. And no waste coupled with insolvency being shown, the court should have refused to appoint a receiver in the first place, but after having done so the guardian had no power to give away by agreement the rights of the infant appellants to the rents, which were superior to the mortgage of the appellee. Besides this the guardian only

agreed to the appointment of a receiver. He did not agree that the rents should be appropriated to the payment of appellee's debt.

Wherefore, for the reason indicated, the judgment is reversed and cause remanded, with directions to adjudge the rents to the infant appellants in proper form.

J. R. Hallam for appellant.

Jas C. Wright for appellee.

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## PHILLIPS' EX'OR v. PHILLIPS' ADM'R.

(Filed October 11, 1883.)

1. Costs-Executor—Where an executor acts in good faith and upon reasonable grounds in attempting to probate the will nominating him, he is entitled to recover out of the estate his costs incurred in the proceeding, including a reasonable attorney's fee and other incidental expenses, and the provisions of General Statutes, chapter 26, relating to costs. do not apply.

2. Testamentary capacity—Soundness of mind in making a will is capacity. to prove by the testator his legal heirs, and his legal estate, and to dispose of the same in a rational manner, according to a fixed purpose of his own. (Tudor v. Tudor, 17 B. Monroe, 391, affirmed.

3. Instruction—In instructing the jury undue prominence should not be given to any fact or circumstance proven in the case.

Appeal from Lincoln Court of Common Pleas.

Opinion of the court by Judge Hines.

This is a contest as to which of two papers is the true and last will of D. M. Phillips. The paper purporting to have been executed in 1869 gives the property to the nominated executor, J. G. Phillips, in trust for the son of D. M. Phillips, and in case of his death to certain charitable uses. The other paper, executed after the death of the testator's son in 1877, gives the estate to B. H. Ray and Ben. Doour, nephews of the testator and nearest of kin, to whom the estate would have passed in case of intestacy. The J. G. Phillips, the nominated executor in the will of 1869, offered it for probate, when he was met by appellees with the claim that the will of 1877, which in terms revokes all other wills, was the last and true will of D. M. Phillips. The will of 1877 was admitted to probate, whereupon appellant, J. G. Phillips, as nominated executor,

appealed to the common pleas court, where the question as to which of the two papers, if either, was the will of D. M. Phillips was submitted to a jury, and a finding had in favor of the will of 1877. From that finding this appeal is taken.

The issue below was whether the testator was of sound mind, and whether the will of 1877 was obtained by undue influence.

The record contains some two thousand pages, with much conflicting evidence, but after a careful reading and consideration of it we arrive at the conclusion that the weight of the evidence is in favor of the sanity of the testator at the time of the execution of the will of 1877, and that no undue influence operated to secure its execution: but if we were not satisfied of this we could not disturb the verdict of the jury unless the weight of the evidence was flagrantly against the finding of the jury, as verdicts in will cases are to be treated in this court as verdicts in other cases.

The one hundred and sixty-nine assignments of error in this case may be condensed and stated in substance as follows:

1. That the court should not have submitted the issue on each of these wills to the same jury—as it is claimed the field of testimony necessary to go over on these two issues was so great as to create confusion in the minds of the jury.

2. That it was error to allow the devisees, B. H. Ray and Ben. Doour, to testify.

3. That the court erred in various instances in the admission and rejection of the evidence.

4. Errors in giving and refusing instructions.

5. In giving personal judgment against appellant, J. G. Phillips, for costs.

As to the first assignment we think the court below pursued an eminently wise and proper course in submitting the issue of will or no will, as to each of these papers, to the same jury, and acted properly in the method of introducing testimony to sustain or otherwise.

The second objection that the devisees, Ray and Doour, were permitted to testify, has been repeatedly decided in favor of their competency. Milton v. Hunter and Cave v. Cave, 13 Bush, 168 and 453; Flood v. Pragoff, 79 Ky., 614.

The third point covers the admission and rejection of evidence in a great number of instances. We have examined them all, and while in several cases we find technical errors, both in the admission and rejection of evidence, there is nothing to materially injure or prejudice appellants, and we will, therefore, not discuss them in detail, as it would be a useless consumption of time.

The principal complaint on the fourth point is that the court did not correctly define to the jury that soundness of mind necessary to the valid making and execution of a will. The court defined it as follows:

"That soundness of mind in making a will is capacity to prove by the testator, his legal heirs and his legal estate, and to dispose of the same in a rational manner, according to a fixed purpose of his own."

This is the same instruction, in substance, that was given and approved in Tudor v. Tudor, 17 B. Monroe, 891, and which has been so long and so repeatedly endorsed by this court; we are not inclined to disturb it, although it be possible to get an instruction with more technical accuracy. It is not calculated to mislead the jury, and that is reason enough for allowing it to remain as it is. (Wise v. Foote, opinion February 5, 1883, 4 Law Reporter, 645.)

The instructions given by the court as to some delusions and undue influence accord with our view of the law, and with the repeated rulings of this court. An attempt at a fuller and more accurate definition of any of these words would more probably mislead and confuse the average juror than to enlighten him.

Many of the instructions asked for by appellants and refused were in reference to the weight to be given certain portions of the evidence, and as the presumptions to flow from given relations between the parties and the testator. Many of them are abstractly good law, and would be applicable if the court were to determine the facts as well as the law, but they are not applicable under our system where the law is for the court and the facts for the jury. In such cases undue prominence should not be given in the instructions to any fact or circumstance

proven in the case. Where the evidence is determined by the court to be competent it goes to the jury for them to weigh.

The question presented by the fifth point requires more elaborate treatment than any of the others.

If the provisions of the General Statutes in regard to costs generally apply to the costs of a nominated executor who fails, when acting in good faith, and upon reasonable grounds, to secure the probate oft he will in which he is named as executor, then the judgment of the court below, adjudging against him personally the costs, is correct, otherwise not. That the provisions in reference to costs apply generally to civil and equitable actions, and not to a case like this, we think is clear.

General Statues, chapter 26, section 12, provides that "the party necessary in any civil action, on the merits or otherwise, shall recover costs, unless differently provided for in this chapter." The thirteenth section makes provision for taxation of costs in equity actions. The seventeenth section is as follows: "A personal representative, plaintiff or defendant in any action, shall, if unsuccessful, be adjudged to pay costs as other litigants. The judgment for costs in such cases shall only be against the assets which have or may come to his hands." Nowhere in this chapter are nominated executors referred to, unless this last quoted section refers to them, but that it does not is clear from chapter 39, article 1, section 1, which is as follows:

"The person named in a will as executor of it shall not act as such to any extent until the will, or an authenticated copy of it, is admitted to record, and he has executed bond and taken the oath required by law in the court in which the record is made; but he may provide for the burial of the testator, pay the reasonable funeral expenses, and take care of and preserve the estate." So it is seen that within the meaning of the provisions of the statute as to costs he can not bring an action, and, therefore, they make no provisions for the costs of a nominated executor on failure to have the will probated, although the statute makes it his duty to offer the will for probate, and, as we have held, that it was his duty to prosecute an appeal from the judgment of the county court rejecting the will if he believes the judgment wrong. (Pryor v. Mizner, &c., 79 Ky., 282.) It being his duty to offer the will for probate, and in good faith to exhaust all legal and equitable remedies to

that end, and the statute making no provision for costs, it is reasonable to conclude, as we have adjudged, and as appears to be the general rule, he should be compensated out of the estate for the discharge of this duty. (Gilbert v. Bartlett, 9 Bush, 52; 3 Redfield on Wills, third edition: Ammon's appeal, 31 Penn. St., 311, volume 3, side page 128; Browne v. Davis' Ex'or, 1 Houst., 458.)

The question, then, is as to the manner in which relief should be granted. If the judgment of the lower court is affirmed, the question of the right to the costs would be res adjudicata. If it is reversed and sent back, in what manner shall be determined the amount to which appellant is entitled? If he is relegated to an action in equity a re-examination of the whole of the large record we have been considering would be necessary to a correct conclusion as to whether the proceedings by appellant were in good faith, as well as to determine the amount to which he is entitled. The court from which this appeal comes being one of general jurisdiction, and the question of costs being a mere incident to the main proceeding, there appears no reason why that court may not appoint a commissioner to take proof and report such incidental expenses as counsel fees and whatever reasonable sums appellant may, in addition to the taxable costs, have expended in the effort to probate the paper of 1869, and on that report adjudged that it be paid out of the estate, appellant first accounting for anything belonging to the estate that may be in his hands.

There appears here no evidence of bad faith on the part of the nominated executor, and as this case must be reversed for failure to allow appellant, J. G. Phillips, his costs as nominated executor, we necessarily determine that there was no fraud or misconduct on the part of J. G. Phillips acting as nominated executor.

As all the parties interested in the estate were before the court and had full opportunity to be heard the court erred in refusing to sustain appellant's, J. G. Phillips', motion to allow him his costs.

Wherefore the judgment against J. G. Phillips for costs is reversed, the judgment in other respects is affirmed, and the cause remanded, with directions to appoint a commissioner as

and for the purpose indicated, and for further proceedings consistent with this opinion.

Wm. Lindsay, Russell & Avritt, Welch & Saufley and Hill & Alcorn for appellant.

Rountree & Lisle, Durham & Jacobs and C. S. Hill for appellee.

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## NIX v. CALDWELL.

(Filed October 2, 1883.)

1. Libel—A being on trial before a Masonic Lodge, and appellant having testified against him, appellee made affidavit that appellant could not be believed on oath. Held—That the affidavit was not a privileged communication.

2. Privileged communication—The rule that every one who believes himself possessed of knowledge which, if true, may affect the rights of another, may in good faith communicate such knowledge to that other, applies to cases only where the parties stand in peculiar relation to each other as principal and agent, father and son, and does not authorize one to publish broadcast his belief that another's reputation is such that he can not be believed on oath, although the publication be made in good faith.

3. In a judicial proceeding where a witness is compelled to testify, he is not responsible, though his statements are untrue (unless they amount to perjury). But he is not allowed, in bad faith and knowing that his answer is irrelevant, to malign another party.

Appeal from Scott Common Pleas Court.

Opinion of the court by Judge Pryor.

This action was instituted in the Grant Circuit, and by change of venue moved into the Scott Circuit. It was brought by the appellant, Nix, against the appellee, Caldwell, for an alleged libel published by the latter, affecting injuriously the character of the appellant. The libel was in the form of an affidavit voluntarily given by the appellee at the instance of a member of the Stuartsville Lodge of Masons, to be read at the trial of one of its members.

The accusation pending was against one Redman, and the appellant (plaintiff below) had testified before a committee of the lodge with reference to the charge, and the appellee, at the request of the party on trial, as well as a committee of the lodge, was sworn by a justice of the peace, and made an affida-

vit under his signature, in substance "that the appellant was a man of bad character, and so regarded by his neighbors, and he would not believe him on oath."

The appellee pleaded, first, that what he stated was then and is now true; second, that the affidavit was made in good faith, believing the same to be true, and without malice or any intention on his part to injure the plaintiff, but for no other purpose than to give to the lodge the information he thought, in good faith, he had of and concerning the appellant's character, all of which was done in a prudent and confidential manner, without malice and in the discharge of a social and moral duty. The appellant and the appellee were not members of the lodge, and so far as the record shows were not members of the order.

The appellant objected to the filing of the amended answer containing the several grounds of defense, and also objected to an instruction embodying the legal proposition presented by the amended answer, but his objections were overruled and a trial had, resulting in a verdict and judgment for the defendant (appellee).

The court, in the instructions, said in substance to the jury "that if the defendant, at the time he gave the affidavit, testified in good faith and to what he believed to be true concerning the plaintiff's character, and without any intention to injure the plaintiff, the publication complained of was privileged and excusable in law."

The words published were actionable, and if the defense in the amended answer brings the case within the rule of privileged communications, then before the appellant can recover, although the words published may be written, he must show the existence of express malice. The rule laid down in Townsend on Slander and Libel, to the effect that "every one who believes himself possessed of knowledge which, if true, does or may affect the rights and interest of another, has the right in good faith to communicate such, his belief, to that other, and whether or not he has personally any interest in the subject-matter of the communication," is certainly very broad and comprehensive in its meaning, but certainly can not apply to the character of case being considered. It is also said by Starkie that "communications made in confidence to persons

interested, or by those interested, supposing them to be true, will relieve the party making them from responsibility in the absence of express malice." (1 Starkie on Slander, 321.) This doctrine applies to cases where the parties, by reason of their relations to each other, are interested in the subject matter of inquiry, such as communications made by the agent to the principal—the father to the son, or communications made by one stranger to another upon inquiry as to the standing of those who are seeking places of trust or confidence—such are regarded, when made in good faith, as privileged, and so in cases where the well being of society requires that a party in possession of what he supposes to be facts should disclose them. The authorities, however, are conflicting as to the responsibility of a stranger making a communication to another when there is no common interest in the subject-matter, and the interest is confined solely to the party receiving the communication.

In the cases of Coxhead v. Richards, 2 Mann., G. & S., 628, and Bennett v. Deacon, 2 Mann., G. & S., 569, the court was equally divided on the question as to whether a stranger could volunteer to give the information. (Lewis & Herrick v. Chapman, 16 N. Y., 369.)

It is well settled where the common protection and welfare of society requires that the communication should be made that when made, if in the absence of actual malice, it must be regarded as privileged, but we find no case going to the extent of adjudging that the belief of one as to the standing of another for truth and veracity with his neighbors, however honest the conviction, will justify a publication to the world that the man's reputation is of such a character as that he ought not to be believed on oath, and, although untrue, is excusable in law if the publication was in good faith. In the administration of justice, where the witness is compelled to testify and is not responsible, even if his statements are untrue, unless guilty of perjury, he is not allowed, in bad faith and with a knowledge that his answer is not relevant to the question at issue, to defame or malign a party to the litigation, and when he does so the law ceases to protect him.

While the rule laid down by Mr. Townsend seems so broad as scarcely to admit of an exception where good faith prompts

the disclosure, this same author, after establishing the rule, says that "the publication of defamatory matter is not privileged because made at a public meeting unless pertinent to the matter in hand, and where spoken in the exercise of duties required to be performed;" also "a complaint to a church against one of its members by one who is not a member is not privileged, neither would such a complaint by a member against one who is a member be privileged." (Townsend on Slander, second edition, sections 234, 235.) One who is not a member of a church, making a complaint against one who is, might well maintain, as has been done in this case, that it was to the interest of the society to whom the informed member belonged that his reputation as a man and character should be known, and that, making the complaint in good faith, he was in law excusable.

The elementary books on the subject have not carried the doctrine so far as this, notwithstanding the broad rule established for the protection of those who deem it a duty to speak or publish defamatory matter of their neighbors, and where those making the publication have acted in good faith. In the present case the appellant and the appellee were strangers to the lodge, and the latter saw proper, when he was not involved in the trial of Redman, who was a member, to sign and swear to a writing that was not only injurious, if untrue, to the character of the appellant, but was signed for the purpose of being read in the lodge to show that appellant could not be believed on oath. If Nix, who was not a member of the lodge, had uttered or published defamatory matter of the member being tried, according to the rule laid down in both Starkie and Townsend, he would have subjected himself to an action for damages.

The appellant's character was to be discussed upon the affidavit of the appellee at a meeting where the appellant could not, or at least had no right to, be heard, and the result determined without an opportunity for defense, and doubtless adverse to the good standing of the appellant, as appellee's testimony, in the absence of conflicting proof, would doubtless have controlled the action of the lodge. In the case of Coombs v. Rose, 8 Black. Ind., 155, it was held that "words spoken or written in the regular course of church discipline, to or of members of the church, are, as among the members them-

selves, privileged communications, and not actionable unless express malice appears, but an accusation made by a member of the church on such occasion against one not a member is not, as to him, a privileged communication." It is observed that to extend the rule so as to apply it to strangers may sometimes cause irreparable injury to the character of an innocent person. It results, therefore, that the court erred in permitting the amended answer to be filed, and in instructing the jury, in substance, that the facts therein stated presented a defense to the action. (Lucas v. Case, 9 Bush, 267; Faris v. Starke, 9 Dana, 128; Harper v. Harper, 10 Bush, 447.)

This ruling avoids the necessity of disposing of the other questions made as to the incompetency of the testimony, as the interviews between appellee and the members of the lodge or the committee in the absence of appellant were, in the light of counsel, necessary to make out the defense embodied in the amended answer. Many witnesses were examined on both sides of the case, and the counsel for appellant moved the court to confine the allowance of costs as against him to two witnesses on the side of the defense to any one point, and this was refused.

The statute in regard to taxations of costs directs the clerk "to tax the allowance to witnesses which the court may by order confine to not exceeding two to any one point." The court must exercise its discretion in such cases, and may allow the per diem to more than two witnesses to a point when proper to do so. We perceive no abuse of discretion on the part of the court in refusing to confine the allowance as asked by appellant's counsel.

The judgment below is reversed, with direction to sustain the objections to the filing of the amended answer and to award the appellant a new trial, and for further proceedings consistent with this opinion.

Geo. C. Drane for appellant.

Smith & Needham for appellee.

## ALVIS v. SCHLESINGER.

(Filed September 20, 1883.)

1. Sale of thing not in esse—A. during his mother's life, and having no interest in her estate, conveyed "all the right he then had or might thereafter acquire" in her estate to appellant. But the latter failed to put the conveyance to record until, the mother having died intestate, appellee levied an execution on A.'s share in her estate. Held—The execution must prevail over the deed. At the time the deed was made the thing sold (A.'s interest) had no existence, and any sale of it was, therefore, invalid.

2. Sale of a devise—A devisee may make a valid and binding sale of his interest, under the will, and that, too, in the testator's lifetime, provided the testator in writing obligates himself not to alter the devise. But a sale of the devise on the mere verbal assent of the testator and without his parting with the right to revoke the devise will not be binding on the devisee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

By the terms of a written contract, dated in 1878, Sam'l J. Alvis undertook, for a valuable consideration, to sell and convey to his sister, appellant, Augusta Posey, all the right, title and interest he then had, or might thereafter acquire, by gift, devise or descent, from his mother, Mrs. Augusta Alvis, in the land in controversy, and furthermore agreed to execute and deliver to Mrs. Posey all necessary and proper deeds to perfect the title to the land whenever it could be done, or his interest in the property might be determined.

That paper was not acknowledged before the proper officer and lodged for record until April, 1882, after the death of Mrs. Alvis, and after the levy of the execution of fieri facias in favor of appellee, under which the land was sold. So that even if it had been, at the time it was executed, a deed valid and effectual to convey any interest of Sam'l J. Alvis in the land, not having been lodged for record in the time required by law, it was not good against appellee, who was his creditor at the date it purports to have been executed.

When the attempted sale and conveyance was made by Sam'l J. Alvis to appellant Mrs. Alvis was alive and held the fee simple title to the land, and he then had no right or interest therein, legal or equitable, vested or contingent. In fact, what he sold and undertook or agreed to convey had neither actual nor potential existence. And as the existence of the

thing sold, or subject-matter of the contract, is essential to the validity of a sale, of course the attempted sale to appellant in this instance did not prejudice appellee, who was a creditor, or prevent the levy and sale of the interest of Sam'l J. Alvis in the land after the death of Mrs. Alvis, when for the first time it had an existence.

It is true it is alleged in the answer, to which the general demurrer was sustained, that appellant purchased the interest of her brother at the instance of Mrs. Alvis. But it does not appear from the transaction as stated, nor is it alleged in the answer that she joined in the deed, or in any manner whatever divested herself of title to, or control of, the land or any part of it.

It has been held by this court that in case of a sale of the interest of one expectant devisee or heir to another the ancestor may, in writing executed and delivered, divest himself of the right to make any other disposition of the specifical share of his estate than that stipulated for in the writing. (Lee's Ex'or v. Lee, &c., 2 Duvall, 134; 4 Bush, 357.) But there is a well-defined distinction between a case like the present one, of a mere verbal assent to a sale whereby the ancestor parts with no right of disposing of the whole of his estate as he pleases, and a case where he divests himself of that right as to a portion of the estate designated in a writing signed by himself, in which he agrees to secure it to a child named therein.

The judgment of the court below is affirmed.

Merritt & Dudley for appellant.

Yeaman & Lockett for appellee.

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## HEINIG, &c. v. THE ADAMS & WESTLAKE MFG. CO., &c.

(Filed October 2, 1883.)

**Corporation—It is a condition precedent to the validity of the acts of a corporation organized under General Statutes, chapter 56, sections 5, 6, that the notice required by the statute should be published.**

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

Mrs. Amelia Heinig, the wife of G. E. Heinig, claims that the Heinig Manufacturing Company existed prior to December,

1880, and that it owed her between six and seven thousand dollars; that a great part of the property on which appellant's executions were levied belonged to that corporation, and is subject first and exclusively to the payment of her claims. The appellees denied the existence of such a corporation, and cast the burden upon her to show its legal existence.

A copy of what purported to be the articles of such a corporation were filed by her, but she failed to show that a publication in a newspaper, as required by the statute, was made within three months from the filing of the articles in the county court clerk's office.

Sections 5 and 6 of chapter 56, General Statutes, require as a precedent condition to the validity of the acts of such corporations that notice shall be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, stating the name, general nature, amount of capital stock, whether private property is to be exempted from debt, etc., of the corporation.

The notice must contain the essentials of the corporation. All of which are highly important to the public, for whose especial protection the publication is required by the statute to be made within three months from the date of filing the articles of incorporation.

Such corporations have no right to commence business, or do any corporate acts, until the articles of incorporation are filed in the proper office for record and the notice specified by section 5, supra, is published for the length of time, and within the time, named in sections 5 and 6. The circumstances of this case manifest the wisdom of the statute. Here the wife and daughter-in-law of the alleged president of the corporation are asserting, to say the least, doubtful and suspicious claims, which are not satisfactorily proven and which, if allowed, would swallow up the whole of his property, leaving his creditors who are not of kin to him unsatisfied.

It is not necessary to point out the inconsistencies of the pleadings with the evidence relied on by the appellants; it is enough to say that there is no contract breach and nonpayment, sufficiently alleged with reference to the rent which she

claims against F. M. Heinig & Co., composed of her husband and son.

As the claims, except the rent just named, of Amelia Heinig and Louisa Heinig are against the disputed corporation, which is not shown to have had any legal existence, the judgment, aside from the many badges of fraud exhibited by this record, was correct.

Wherefore the judgment is affirmed.

W. O. & J. L. Dodd for appellants.

Richards & Baskin, Gibson & Gibson and O. H. Pollard for appellees.

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## HENEY'S EX'OR, &c. v. HENEY'S EX'OR.

(Filed October 16, 1883.)

1. Construction of will—When there is ambiguity or uncertainty of meaning in the language used in a will, the facts and circumstances surrounding the testator at the time of making the will and bearing in any way thereon are competent. Where the testator devised to his wife "$14,000, including the notes in her name," and then divided the balance of the estate between his children, the whole estate being worth $19,000 and the notes $8,000. Held—The notes were to be reckoned as part of the $14,000 devise to the wife and not in addition to it, as that would leave little to pay the devise to the children.

2. A testator having in his possession property of one to whom he makes a devise of a specific sum, may provide that the devise shall be reduced by the amount of the property of the devisee held by him.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Hines.

The question presented is the construction of the following will:

"I, R. D. Heney, of the county of Nicholas and State of Kentucky, being of sound and disposing mind and memory, do make and publish my last will and testament in manner and form as follows: First, it is my will that all my just debts, my funeral expenses, and the costs and charges resulting from the settlement of my affairs be paid out of my estate; second, I devise and bequeath to my wife, Martha A. Heney, all the household and kitchen furniture and the sum of fourteen thousand dollars, including all notes in her name, to be paid to her

as soon as they can be collected, the balance of my estate to be equally divided between my three children, W. T. Heney, I. W. Heney and Mary F. Adair; and lastly, I nominate and appoint my son, Wm. T. Heney, executor of my will."

Whether Mrs. Heney is entitled to the fourteen thousand dollars, and in addition the notes in her name, is the issue.

The facts and circumstances surrounding the testator at the time of the execution of the will, and bearing in any way thereon, are competent and proper to be considered when there is ambiguity or uncertainty of meaning in the language used by the testator. The facts and circumstances here are: When the testator married Mrs. Heney he was a widower with three children, having been twice married, having two children by one marriage and one by the other. He was worth about eight thousand dollars, principally, if not entirely, in personalty. Mrs. Heney was a widow with one child, and was worth about eighteen thousand dollars, four thousand dollars of which was in personalty. The whole estate of the testator will amount to about nineteen thousand dollars, including the notes in the name of Mrs. Heney, which amount to about three thousand dollars.

Appellee sets up an antenuptial contract, by which it is alleged that the testator undertook that appellee should own as her separate estate all personalty owned by her, and that the proceeds of any such should be held and loaned out by the testator for, and on account of, appellee, and that the proceeds of her lands, subsequently sold, were to be so held by the testator.

Appellee's personal estate was sold after the marriage, and yielded about four thousand dollars, and the real estate, being sold, yielded fourteen thousand dollars.

The evidence fails to establish the antenuptial contract as to the personal property which went into the hands of and was reduced to possession by the testator; but it is shown that prior to the sale of the land, and as a condition to the consent of appellee to the sale, it was agreed between the testator and appellee that the proceeds should be held by the testator, loaned out and used for her benefit as her separate property.

The word "including," following the devise of fourteen thousand dollars, considered in its ordinary and generally-accepted meaning, is to be construed as embracing or constituting a part of the fourteen thousand dollars, and not that the notes are to pass in addition to the fourteen thousand dollars. The expression "I devise and bequeath * * * all the household and kitchen furniture and the sum of fourteen thousand dollars," shows that the testator knew how to use language expressive of accumulation when he so desired. As the testator is presumed to have known the condition of his estate, and that if the fourteen thousand dollars and the notes were to go to appellee there would be comparatively nothing for his children, the devise of the remainder to his children is a strong presumption in favor of the construction that the notes were to be a part of the fourteen thousand dollars devised, and not in addition thereto.

It is true that the notes, being in the name of appellee, never having been collected and reduced to possession by the testator, remained the property of appellee, but there can be no question that a testator having in his possession property of one to whom he makes a devise of a specific sum, may provide that the sum shall be reduced by the amount of the property of the devisee held by him. So that it is at last only a question of intention, and that intention appearing in this case from the language of the will, and not modified by the surrounding circumstances, to be that appellee shall have only the sum of fourteen thousand dollars, to be paid in part by the notes held by the testator and made payable to appellee. The judgment is reversed and cause remanded, with directions for further proceedings consistent with this opinion.

Chief Justice Hargis not sitting.

W. P. Ross and Wm. Lindsay for appellants.

Thos. F. Hargis, Reid & Stone and W. P. D. Bush for appellee.

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## WEISERT, &c. v. MUEHL.

(Filed October 16, 1883.)

**Insurance—Where a policy provides that the heirs of the insured are to take the proceeds of the policy upon his death, he can not deprive the heirs**

**of the benefits of the fund by devising it to another. Though where it appears that the devisee of the policy has saved it from forfeiture by paying some of the premiums on it, she is entitled to be reimbursed therefor out of the proceeds of the policy.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

July 5, 1879, the National Mutual Benefit Association, created a corporation by an act of the General Assembly, issued and delivered, duly signed by its proper officers, the following certificate: "This is to certify that Fred. W. Weisert, of Louisville, Ky., in consideration of the representations made in the application, and of the payment by him of ten dollars membership fee and two dollars annual fee, and the further agreement to pay all assessments that may hereafter become due under the charter, is duly enrolled as a member of the National Mutual Benefit Association. The said Fred. W. Weisert hereby agrees to pay said Association the further sum of two dollars on each anniversary of his membership, and the further sum of $1.25 within thirty days after the death of any member of the Association. * * * And it is agreed and understood that a failure on the part of said party to pay said sum within thirty days shall forfeit his membership and all benefits accruing therefrom. In consideration of the above the National Mutual Benefit Association agrees to pay to his heirs within thirty days after the proof of his death is received, and on surrender of this certificate, such sum as may be realized from from an assessment on all surviving members of the Association, as provided in the sixth section of the charter." Afterwards Fred. W. Weisert, executed upon the back of the certificate the following: "Louisville, Ky., January 15, 1880, This day appeared Fred. W. Weisert and says he wishes at his death that the amount due on this policy, and directed to be paid to his heirs, shall not be paid as directed, but that he wishes the amount to be paid to Mrs. Ottillie Muehl.

"FRED. W. WEISERT.

"Signed in presence of Geo. D. Sparks.

"Attest: I. T. PEARSON, Notary Public."

Weisert having died soon after the execution of the writing upon the back of the certificate, it was duly proved and admit-

ted to record by the Jefferson County Court as his last will and testament.

The amount of the policy realized, as provided by the charter from the assessment on the surviving members of the Association after his death, was paid to appellee Sparks, appointed administrator of his estate with the will annexed. And this action was brought by appellee, Ottillie Muehl, the devisee, to recover of the administrator the residue of that fund left in his hands after the payment of debts and expenses of administering and settling the estate.

During the pendency of the action appellants filed their petition, claiming the proceeds of the policy in the hands of the administrator as the mother, brother and sisters, only heirs at law of decedent Weisert, and controverting the claims of the plaintiff and the other parties to the action. Whereupon they were made parties defendant, and their petition ordered to be treated as their answer. Subsequently, however, a general demurrer to their answer was sustained. And though an amended answer and cross petition was tendered, it was not permitted to be filed, but judgment was rendered directing the payment to Mrs. Muehl, the devisee, of the balance of the fund after paying the demands of creditors reported by the commissoner of court, allowance to the administrator, and costs and expenses of the action.

From that judgment the heirs at law of decedent have appealed, contending that neither the devisee under the will nor the administrator of the estate are entitled to any part of the fund in dispute.

As this record stands there can be no question as to the propriety of probating and admitting to record and treating the paper mentioned as the last will and testament of Fred. W. Weisert. Not admitting appellants to be his mother, brother and sisters, and that he died without father or child, can there be any question but that by the aplication "heirs" used in the policy of insurance they are sufficiently designated as those appointed by law to succeed to the estate of the deceased, for their relation to him is described by the term used with sufficient certainty, because capable of being rendered certain. (Tucker, &c. v. Tucker, &c., 78 Ky., 503; Gosling v. Caldwell,

1 Lea., Tenn., 454; Gaugh v. St. Louis Mut. Life Ins. Co., 88 Ill., 252.)

The main questions, therefore, in this case is whether, having designated in the policy his heirs at law as the persons to whom he then elected, and the association, by the terms of the contract agreed, to pay the fund to be realized at his death, as provided in the charter, Weisert could afterwards by will devise the fund to a different person, and thus deprive his heirs of it, or any part of it.

The general rule, as stated by Bliss on Life Insurance, sections 317, 339, and which seems to be accepted by the authorities generally, is that a policy and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by an act of his, by deed or will, to transfer to any other person the interest of the person named. He is under no obligation to continue to pay the premiums unless he has covenanted to do so. But if he does the person originally designated in the policy will derive the benefit.

The principle upon which this rule is founded is that where the policy of insurance is issued rights are vested which can not be divested without the consent of those to whom they are secured. (Gould v. Emerson, 99 Mass., 154; Eadie v. Slimmon, 26 N. Y., 9; Ruppert v. Mutual Life Insurance Company, 7 Robertson, N. Y., 155; Gosling v. Caldwell, supra; Gaugh v. St. Louis Mut. Life Ins. Co., supra.

In the case of Robinson v. Duvall, 79 Ky., 83, Crofoot obtained a policy of insurance in the Connecticut Mutual Life Insurance Company, payable at his death to his wife and children, or their representatives. Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, intending it as a gift to her. But this court held that the assignment of the policy did not have the effect to deprive the grandchild of the deceased of her interest in right of her mother.

In our opinion there is no such difference bewteen an ordinary life insurance company and mutual benefit association like the one under consideration as would restrict the opera-

tion of the rule just mentioned to the former and not extend and apply it to the latter class of life insurance companies. (State v. Merchants Exchange and Mutual Benefit Society, 6 Central Law Journal, 491; Commonwealth v. Wetherbee, 105 Mass., 149.) The certificate issued in this case is in substance a policy of insurance and a contract between the company issuing and the person receiving it. Unless, therefore, the charter of the National Mutual Benefit Association makes a distinction the policy in this case must be treated like those issued by other life insurance companies.

As held by this court in the case of Basye v. Adams, 5 Kentucky Law Reporter and Journal, 91, August, 1883, "the association was incorporated for two distinct objects, and provision was made in the charter for raising two distinct funds. One of the objects is to relieve the necessities of sick and disabled members, or to confer charities in the discretion of the directors, and for that purpose a permanent fund is provided for by the charter. The other object is to pay to the legal heirs or beneficiary of a deceased member such sum as may be realized from an assessment on all surviving members, less twenty per cent. to be deducted for the permanent fund and expenses."

It thus appears that the assured as a member of the association has personal privileges and interests in the permanent fund, which can not be transferred by him to any other person, while there is another fund, created by assessment after his death, which, by the terms of the charter, is to be paid to his legal heirs or beneficiary.

By section 8 of the charter it is provided that "no part of the interest of any member of the association shall be subject to any debt, liability, or legal or equitable process against them, or which may alienate the benefits from the legal heirs."

While, therefore, the person obtaining the policy may designate a different person or object than his legal heirs, yet it is obvious that they are the persons primarily contemplated by the charter as recipients of the fund realized after his death.

But certainly there is nothing in the charter that confers the right upon the assured, after having designated in the certificate his legal heirs as the beneficiaries, by deed or otherwise, to divert the fund from them.

In our opinion, therefore, appellants, notwithstanding the devise to appellee, Mrs. Muehl, are entitled to the fund in controversy.

It appears, however, that some of the premiums were advanced and paid by Mrs. Muehl, whereby the policy was saved from forfeiture.

She should be reimbursed such sums out of the funds in court.

Wherefore the judgment of the court below is reversed and cause remanded for further procedings consistent with this opinion.

Brown & Davie and Wm. Reinicke for appellants.

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## BOWMAN v. SIMS, &c.

(Filed October 2, 1883.)

**The statute of limitation (General Statutes, chapter 71, article 6, section 4) providing that a surety shall be discharged after seven years from the time the cause of action accrued, where A undertakes, as surety, to indemnify B against a certain debt, the cause of action does not accrue against A until B has paid the debt. But if the undertaking is construed to be an agreement to pay B a sum of money in any event and not merely to indemnify him in case he has to pay the money to another, the cause of action accrues and the statute begins to run from the time A fails to pay the money and not from the time B has to pay it.**

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hines.

The principal question in this case is whether the surety in the following obligation is released by lapse of time:

"We, the undersigned, bind ourselves to pay the indebtedness of the firm of Bowman & Co., Woodville, Kentucky, the said firm being composed as follows, to wit: J. H. Bowman, R. S. Hill and James Stovall, the indebtedness of said firm being six thousand and six hundred dollars and interest, and a portion of that amount for seven months and some about one month. We bind ourselves to pay the same as soon as possible, and we further bind ourselves to accept and pay any acceptances that J. H. Bowman may draw on us to the amount as above, or any amount less the amount we have at any time not paid, the said Bowman only drawing on us at such time as he

may think proper, and giving the creditors of said firm a fair and equal settlement. This October 8, 1860."

Under the statute in this State the surety is released from liability after seven years from the time a cause of action accrued against him. The question is as to when a cause of action accrued.

If the contract is one of indemnity to appellant the cause of action did not accrue until he had been compelled to pay the debts against which he was indemnified; but if the contract is special the statute runs from the breach thereof, and not from the time of damage resulting from a breach. In this case the undertaking appears to be a special contract, as distinguished from an indemnity, and as the action was not instituted until the 8th of March, 1869, and a cause of action arose, at the farthest, within seven months of the date of the execution of the bond, the statute applies. (2 Chitty on Contracts, pages 1231-1233; Angell on Limitation, chapter 12, sections 128-137; Colvin v. Buckle, 8 Mee. & W., 688; Carter v. Adamson, 21 Ark., 293; 3 McKerras v. Gardner, Johns., 137.

Judgment affirmed.

Bigger & Reid for appellant.

L. D. Husbands and Henry Burnett for appellees.

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## McLAUGHLIN, &c. v. LIST, &c.

(Filed October 12, 1883.)

1. Judicial sale—Homestead—Mortgage—At the instance of A, holding a vendor's lien, and B, a mortgage inferior to the lien, a tract of land was ordered sold to pay them in the order of their priorities and then, thirdly, to pay C, the owner of the land, who claimed a homestead. At the sale B, the mortgagee, declined to take bonds for his share of the purchase money and accepted instead the notes of the purchaser, secured by a mortgage on the land. The purchaser failing to pay, a resale was ordered, which was made for a sum sufficient to payA, but not enough to pay B and C. Held—B, by accepting the notes of the purchaser instead of bonds under the judgment, had postponed his (mortgage) claim to C's (homestead), and C must be paid first.

2. Final order—In an action brought to subject land to the payment of lien claims, an order distributing the proceeds of sale is a final order, and can be appealed from without excepting to it or moving to set it aside.

3. Mortgage—Where mortgaged property is sold under order of court for sufficient to pay the mortgaged debt, the mortgagor is discharged and the mortgagee must look to the purchaser at the sale, his surety on the bond and to the land.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The appellee, List, Howard and others held liens on the Clinton House in Covington to secure the payment of certain debts owing them by the appellant, McLaughlin. The property, under a proper proceeding in equity, was sold to satisfy the various liens, and purchased by Bly & Bro. for $28,000.

The property being indivisible, the whole was sold, and satisfied not only the lien debts, but realized a sum sufficient to secure the homestead, or its value, claimed by McLaughlin. The commissioner was directed to take bonds from the purchasers to satisfy the several liens, and a bond to McLaughlin for $1,000, the value of his homestead.

The bonds were executed for the amount due Howard, who had a vendor's lien, and to McLaughlin for the $1,000.

List, who was secured by mortgage, and whose lien was inferior to that of Howard, declined to have any bond executed to him for the purchase money to which he was entitled, but made an arrangement with Bly & Bro., by which they executed to him their notes payable in 1, 2, 3, 4 and 5 years, the interest to be paid semi-annually, for the amount due him, and took from them a mortgage on the entire property to secure these notes, reciting in the mortgage "that his lien is hereby continued, and not in any manner intended to be relinquished." The purchasers, Bly & Bro., were nonresidents, and before the action under which the sale was made was finally disposed of the surety on the purchase money bonds to Howard and McLaughlin became insolvent.

A rule to pay the money proving ineffectual and, perhaps, never issued, McLaughlin and wife filed their petition, which was consolidated with the original action, asking that the property be sold to satisfy their lien for the homestead right evidenced by the bond executed by the purchasers as directed by the court. Howard and List were before the court asserting their claims, List, the appellee, asking that the second

mortgage be enforced, and maintaining that the original lien created by the first mortgage and the sale under it went into the second mortgage, or, in other words, that he had never waived the priority he had over the homestead claim by reason of the first mortgage, in which the wife of McLaughin relinquished all right of homestead.

A judgment was rendered in the consolidated causes, and a resale was ordered by the chancellor without determining the question of priority. List, the appellee, became the purchaser at the last sale, for about eleven thousand dollars, a sum sufficient to pay off Howard and McLaughlin, but not sufficient to pay List.

List executed bonds for the purchase money and, by an order of court subsequently made, was allowed to pay off the bonds before maturity, and the commissioner was ordered to distribute according to the former order of court. There never was any order of distribution made in the consolidated causes, nor did it appear that the commissioner had any money in his hands. Howard, it seems, was paid, his being a vendor's lien, and the bonds of List cancelled and a conveyance made to him of the property. It does not appear that the parties were in court objecting to the orders or the mode of distribution, and if they are to be presumed to have knowledge of the orders made McLaughlin appeared in court and moved to set the orders aside, but the court overruled his motion and he has appealed. The bonds of List were cancelled after the payment to Howard, upon the idea that he was then entitled to the whole of the purchase money, there not being enough to pay McLaughlin.

It is insisted that the orders of distribution were not final, and no appeal can be taken from them. If not final the motion to set the orders aside could be entertained, and the failure to do so gave the right of appeal, because the effect of the orders made was to distribute the fund. This was final, and all that remained to be done, and it was unnecessary, in our opinion, to make the motion to set the orders aside, or to except to the final judgment. The only question is, did the appellee lose priority over the homestead claim by reason of the acceptance of the mortgage and the execution of the notes to him by Bly & Bro?

The original debt was due by McLaughlin to List. The lat-

ter had sold McLaughlin's property, and by the purchase the debt due to him by McLaughlin was satisfied. He owed him nothing. Bly Bros. became the debtors instead of McLaughlin and List had to look alone to Bly & Bro. or to the chancellor to enforce his claim. When the chancellor sold, if there had been a deficit of purchase money the priorities would have been, 1, Howard, the vendor; 2, List, the mortgagee; 8, McLaughlin, the owner of the homestead; but here it was for a sum sufficient to satisfy all.

List declined to accept the tenure upon which the sale was made by the chancellor, and instead of requiring the execution of bonds for the purchase money for his interest, expressly waived that right and entered into a new contract with Bly & Bro., by which he accepted a second mortgage and gave to them, as purchasers, 1, 2, 3, 4 and 5 years in which to pay his debt, and attempts by the stipulations of the second mortgage to retain a lien that he once had to secure these deferred payments. This he might do as between himself and the debtor, but the rights of third parties are to be affected by it, and when the chancellor is asked to enforce the collection of the purchase money he is informed that so far as Howard and McLaughlin are concerned the commissioner has followed the mandate of the court, but that List has extended the payments of what is due him for five years, and executed no bond as directed by the court, and it is now urged that the chancellor, before paying McLaughlin, must adjudge that the lien of List still has priority.

The property sold for $28,000, and by the terms of sale the purchaser was to give bond, with surety, for the entire amount. The purchasers may have been able to give security for the four thousand dollars due Howard and McLaughlin, and unable to give security for the entire sum, and this doubtless induced List to extend the time of payment and take the second mortgage. But for this security could have been required for all, and for such a sum the commissioner could, and doubtless would, have required other sureties than those taken for a part of the purchase money. If the security could not have been furnished a release would have been made at the time, or again ordered without such a delay as has caused a decline of the property in this case from $28,000 to $11,000.

The appellee is setting up two distinct liens. One, as he maintains, was retained by the chancellor, who was the vendor, and the other by reason of the mortgage to secure the deferred payments. While such liens might exist as between the parties, it is difficult to perceive where the lien of the chancellor exists when the creditor, by his own act, has rendered him powerless to enforce it: He has no bond before him executed by the purchaser to the commissioner for the debt of appellee, but finds with the second mortgage the notes payable in one, two, three, four, and five years, and is asked to foreclose a second mortgage executed by a different debtor to satisfy a claim against McLaughlin that was satisfied in full by the sale in the original action. As the case stands Howard and McLaughlin could have applied for the rule against the purchaser to pay the money into court, and conceding, for the purpose of illustrating the principle recognized, that they had received upon the rule the entire amount of their bonds, and the appellee who had, as he maintains, the prior claim in the first instance, appeared in court, maintaining that the purchaser and his surety were insolvent, and asking that Howard and McLaughlin be compelled to refund, either in whole or the pro rata portion to which appellee was entitled, will it be seriously argued that the chancellor, with the facts before him as to the contract between List and the purchaser, would require them to refund or pay back the money? In this case the appellee voluntarily declined to have the commissioner take bonds for his debt, and while perfetcly secure, relieves the chancellor of any further control of the fund by executing a contract upon a consideration that will authorize it to be enforced, but not at the expense of those who are in no manner parties to it. What interest did appellee have in the sale made by the commissioner? He had no bond for his debt, and when applied to for a rule the stipulations of the last mortgage and the condition of the notes would be a complete response. The appellee in this proceeding (the new action) is asserting a debt against Bly & Bro., and not against McLaughlin, and as the record now appears the chancellor should have set the orders aside and required appellee to pay to McLaughlin the amount of his bond.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

J. G. Carlisle and W. W. Cleary for appellants.

J. F. & C. H. Fisk for appellees.

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## KENTUCKY SUPERIOR COURT.

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### SHANKLIN v. MEYLER.

(Filed October 3, 1880.)

**Attorney—Where an attorney employed to establish a lien upon certain property purchases a claim adverse to that lien, the purchase is either void or accrues to the benefit of the client, at the election of the latter.**

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Richards.

On the 18th day of March, 1874, Mrs. Cordelia Shanklin made a general assignment for the benefit of her creditors, of all her property not exempt from execution. This deed was written by appellee as the attorney for Mrs. Shanklin. He then accepted employment from two of the grantor's children, appellant and his sister, to attack and set aside the deed he had acted as counsel in procuring. He filed the petition for his own clients on August 14, 1874, alleging that the deed was void and fraudulent as to them, because the grantor had directed her property to be equally distributed among her creditors, when they had a satisfactory lien upon her estate for the amount the grantor owed them as their guardian. This action was commenced in the face of the reported decisions of the Court of Appeals, to the effect that the statute gave a ward no lien upon the property of a living guardian. (Hemphill v. Lewis, 7 Bush, 215; Hampton v. Morris, 2 Met., 338; Chanslor v. Chanslor, &c., 11 Bush, 664.)

So when the appellee prosecuted for his clients an appeal from an adverse decision of the aforesaid action the Court of Appeals, in holding that no such lien existed, but reiterated a principle already well established. But while that case was pending in the circuit court, and while appellee was endeavoring

to maintain the alleged lien for his clients, one Birkhead, through his attorney, F. P. Straus, sued Mrs. Cordelia Shanklin on the general deed of assignment, obtained a judgment at law, issued an execution, levied it upon the interest of Mrs. Shanklin in certain real estate, and on June 21, 1875, the sheriff sold the property levied on, Birkhead himself being the purchaser, for the sum of $211.80, the amount of the execution. On August 31, 1875, without any explanation appearing in the record, another execution was issued upon the same judgment, and levied upon the same property already sold. This execution was returned September 20, 1875, "not sold by order of plaintiff's attorney."

A venditioni exponas was then issued on October 26, 1875, which was returned with the following endorsement: "The within named levy is released, fi. fa. is ordered to issue October 27, 1875. F. P. Straus, P. Q." So on the same day another execution of fieri facias was issued, and this was also levied upon the interest of Mrs. Shanklin that had been sold to Birkhead under the first writ. Under this execution the sheriff again sold the property, as his return purports, to Robt. Shanklin, appellant herein, for $216.79, the amount of the debt, and took his bond, with R. J. Meyler, appellee, as his surety. On February 20, 1877, the sheriff made Robt. Shanklin a deed for the interest supposed to have been purchased by him at said execution sale.

On April 2, 1877, Meyler, still acting as the attorney for Robt. Shanklin and his sister, filed an amended petition for Robt. Shanklin above, alleging that he had purchased the interest of their mother in the land described at said execution sale, and by reason thereof he had "become the legal owner and title holder of the entire interest of C. Shanklin in the land named in the petition and cross petitions in this action, and said interest is not subject to the debts of any other creditors."

Robert Shanklin neither signed nor swore to this announcement, which was directly antagonistic to the claim for a prior statutory lien asserted by himself and sister in the original petition; and if this amendment had been maintained it would of itself necessarily have resulted in excluding the sister from any participation in the proceeds of the sale of the tract.

But as the execution under which the title was asserted did not issue until long after Mrs. Shanklin had executed the deed of assignment that conveyed all her interest in the land in controversy, there was no foundation in law or equity upon which this amended claim could rest, and when the case came to the Court of Appeals they so decided.

That court, in passing adversely upon both of the aforesaid claims of Robert Shanklin, directed all the property of Mrs. Shanklin to be sold, and the proceeds distributed equally among her creditors, according to the terms of her deed of assignment. When the aforesaid tract of land was sold Robert Shanklin again became the purchaser at $225.00. He then commenced this action against his former attorney, R. J. Meyler, Esq., to recover what he had paid, and agreed to pay, upon his transactions touching the Birkhead execution.

The plaintiff alleged that he was not present at said execution sale, and did not, in fact, bid or authorize any one to bid for him; but that when he next saw Mr. Meyler his said attorney told him he had bid the property in for him, the plaintiff, representing that he would get a good title under the purchase, advised him to permit his name to be substituted as purchaser, and to execute his bond, which he did, his attorney signing as surety; that he afterwards paid Meyler $160.00 on said bond, and gave his note for $71.96; that he subsequently learned that Meyler had, prior to the issuing of said execution, purchased the Birkhead claim for about $40.00, and, concealing the fact from him, had induced him to execute the bond to Birkhead.

The defendant admitted he had become the owner of the Birkhead debt between the levy and sale, at either $65.00 or $75.00; that Shanklin was not at the sale; but claims that he told Shanklin he had purchased it (but not at what price), and denies that he advised him anything about what title would pass under the sale.

We find in the brief signed by Mr. Meyler, and filed by him for his former client in the Court of Appeals, this statement: "We did (not) force or ask the sale, it was forced by Birkhead, and we were the highest bidders, and could not stand by and risk the sale to others." And yet he now admits that at the time of the sale Birkhead had no interest whatever in the ex-

ecution, and, therefore, could not have "forced" the sale. If he had previously informed his client that Birkhead had parted with his interest prior to the execution sale, why was this imposition practiced upon the appellate court?

However, it seems strange if both Shanklin and Meyler understood Meyler owned the claim, that a sale bond should be executed payable to Birkhead, and that Meyler should sign it as surety, in other words, become surety to himself.

We accept as true the statement of Mr. Straus, a creditable and disinterested witness, that he told Shanklin that Meyler had purchased the claim, but he may be mistaken as to the date of this interview, or Shanklin, who is a dull business man, might not have fully understood him.

But we need not go behind appellee's own version of this transaction. He was at the time under employment as an attorney to establish a lien in favor of appellant and his sister upon this identical property, and to subject it to the payment thereof. During the progress of the litigation, without consultation with his clients, he purchases for himself, from a third party, an execution that had been levied upon that property, and causes a sale to be made and bid it in. He says he then believed he thus acquired a good title. If his opinion had been correct he would have been the owner of a title that would have defeated the lien he had been employed to establish. If he had continued the owner of this demand and claimed under it he would have been asserting a fee simple title in himself on the one hand, and on the other he would have been bound, under employment as attorney, to argue that the title was still in Mrs. Shanklin, and liable for the debts of his two clients.

Will public policy permit an attorney to thus array himself against his clients? Is not the purchase of the attorney, under such circumstances, for the benefit of the client, or void, at his election? Will equity uphold a subsequent transfer of his bid to one of his clients at a greatly enhanced price, to the exclusion of the other, especially when the client is not informed what the property had really cost, nor advised whether the purchaser under the execution sale would acquire any title?

"The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the

subject of purchase is not confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees, attorneys or solicitors. It is a rule which applies universally to all who come within its principle; which principle is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser for his own account, and for his individual use." (1 Wait's Actions and Defenses, 246.) So it has been held that counsel who has been consulted about a title to land will not be permitted to purchase an outstanding one and set it up in opposition to his client. (Hockenbury v. Carlisle, 5 Watts & Serg., 348.)

In Gildings v. Eastman, 5 Paige, 561, the learned Chancellor Walworth decided, in a case very similar to the one we are considering, that an attorney who had been employed to foreclose a lien could not purchase for himself the equity of redemption. The Supreme Court of Pennsylvania, in an opinion rendered by Sharswood, J., in Smith v. Brotherline, 62 Penn. State, 469, said: "A counsel or attorney, employed and consulted as such to draw a deed or an application for an original title to land, is in the line of his profession, and is precluded from buying in for his own use any outstanding debt. The relation between him and his client is confidential, and whether he acts upon information derived from him or from any other source, he is affected with a trust. This is on the ground of policy, not of fraud; for the attorney may be entirely innocent of an intention to deceive, and act in the most perfect good faith. It is of the utmost importance that even should he be able to entrust with entire safety their most secret interests to their professional advisers. Hence the rule is an unbending one, and without exception, that when the attorney buys in a title, outstanding or adverse to land as to which he has been consulted or employed, he buys for his client if the client should elect to take it."

And to the same effect are the cases of Henry v. Raiman, 25 Penn. State, 354, and Stockton v. Ford, 11 How., 232.

If, then, the purchase of the execution had been of any value, the appellee would not have been heard to say that he purchased for himself; equity would not have permitted him

to acquire a title adverse to the lien he had been employed to establish and foreclose. The appellant might have refused to take the purchase from the attorney's hands, and yet the attorney would not, in equity, have been permitted to assert the adverse title as against his clients. But had the client, after being fully informed of all the facts, and correctly advised as to the value of the execution levy, elected to treat the attorney as a trustee purchasing for his use and benefit, equity would have so decreed; and in that event the appellee could only have properly received from his client the sixty-five or seventy-five dollars he had himself paid for the execution title.

The rule as announced by the chancellor in Howell v. Ransom, 11 Paige, 540, is that "the attorney can never sustain a purchase of this kind without showing that he communicated with his clients everything which was necessary to enable them to prove a correct judgment of the actual value of the subject of the purchase." It was not necessary that there should have been any actual fraud on the part of the appellee, but owing to the confidential relations that existed between him and his client he was bound to disclose all the identical facts relative to the execution levy he proposed to sell. Had he done this appellant would have been advised that the sheriff had exhausted his authority by the first sale, at which Birkhead bought; that Birkhead had himself only placed a nominal value upon his claim, for he had sold it for sixty-five or seventy-five dollars; that in fact the levy was not anything, for long before the execution issued Mrs. Shanklin had conveyed her interest in the property by a deed of assignment prepared by appellee.

Nor can he escape his duty to make this disclosure to his client by saying he did not understand that the deed of assignment covered this property, for he must be presumed to have known this, both from the fact that he wrote the deed and from his position as legal adviser in regard to this identical title. He was, therefore, not only bound to advise appellant, but to advise him correctly in regard to the value of this levy; for if the attorney had sold to his client upon the representation that the levy and execution sale would confer a good title there can be no question but what equity would compel him to refund the consideration.

If, on the other hand, the attorney had discharged his obligations to his client, and advised him that the levy of the execution and the sale thereunder were null and void, that any title asserted thereunder would be utterly worthless, then we may reasonably assume his client would never have bought, and this litigation would not have arisen. An attorney can traffic with a stranger and not incur any liability by reason of his profession, but if he wishes to sell to his client an outstanding title, purchased during the litigation about that identical property, he must inform himself of its legal value and advise his client accordingly.

This principle rests, not upon actual fraud, but upon the necessity of guarding and protecting the confidential relations that must exist between the attorney and his clients.

The judgment is, therefore, reversed and the cause remanded, with directions to enter a decree in appellant's favor for the cancellation of the remainder of the note and further recovery of the $160.00, with interest from January 5, 1876.

W. R. Thompson for appellant.

F. P. Straus for appellee.

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## WARTON v. WARTON.

(Filed October 17, 1888.)

1. Usury—Where a purchaser executes his note for the purchase price of land with interest, until maturity, at a rate greater than the legal rate, the contract is not usurious, the rate of interest being part of the consideration paid for the land; but if the note bear interest at such rate, after maturity, it is usurious, the interest becoming then the consideration for forbearance to demand the money already due.

2. A claim should be purged of usury, whether usury has been pleaded or not.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Richards.

The appellee commenced this action in equity to recover the amount of a promissory note given in part payment for land, and the foreclosure of the vendor's lien. A judgment was rendered in his favor for the face of the note and ten per cent. interest from April 4, 1870, until paid. This appeal presents

the single question whether the contract to pay ten per cent. after maturity was usurious.

It is conceded by the appellant that the interest between the date of the note, April 4, 1870, and its maturity, October 1, 1870, was part of the consideration of the sale, and that under the authority of Tousey v. Robinson, 1 Met., 664, and Gruell & W. v. Smalley, 1 Duvall, 359, the interest contracted for prior to the maturity of the note was not usurious.

Those decisions were based upon the idea that the interest agreed to be paid before maturity was not for the loan or forbearance of money, but was part of the purchase price. The question we have under consideration reaches beyond this authority. Here the parties have not only contracted for ten per cent. before maturity, but for the same rate after maturity.

The sale was made on April 4, 1870, "for the sum of $1,100," as the petition alleges, "one-half cash in hand paid, the receipt whereof is hereby acknowledged, and the other half to wit: $550 due on the first day of October, 1870, as is evidenced by a note bearing date on April 4, 1870, and due on the 1st day of October, 1870, but to bear ten per cent. interest per annum from April 4, 1870, until paid." Under this agreement the vendor had the right to collect the deferred payment on October 1, 1870. The contract to pay interest after this date was in consideration of the creditor's forbearance to demand what would then be due, and for this forbearance the statutes then in force forbade a greater rate of interest than six per cent. The contract to pay ten per cent. after maturity was, therefore, usurious. (McCann's Ex'r v. Bell, 79 Ky., 112.)

The chancellor should always purge the claim of all usury disclosed by the record, regardless of whether it has been pleaded as a defense. (Hart v. Hayden, 79 Ky., 352; Lucking v. Gegg, 12 Bush, 298.) He should withhold his judgment for the usurious part of the demand, and enter a decree alone for the principal with legal interest, and direct a sale of the land to satisfy it.

Wherefore the judgment is reversed, with directions to enter a judgment consistent with this opinion.

Geo. B. Nelson for appellant.

James Flanagan and Haggard & Jones for appellee.

## LINDON, &c. v. SEWELL.

(Filed October 17, 1888.)

1. Supersedeas bond—Where one signed, as principal, a supersedeas bond in blank and delivered it to the clerk who filled it up and had the sureties to sign, although without the knowledge of the principal, the bond is valid and binding.

2. Presumption—The bond being filed, it is presumed that the clerk did his duty, and issued supersedeas.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Reid.

The supersedeas bond, as the weight of the testimony shows, was signed in blank, and delivered to the clerk of the circuit court, who filled it up in the proper form. Appellee was not present at the time, and had no knowledge of what passed between the clerk and the sureties. The clerk thereby became the agent of the parties executing the bond, and when he filled it up it was a valid bond. (Yocum v. Barnes, 8 B. Monroe, 496.)

But the serious contention here is that the sureties in the supersedeas bond are not liabe at all, because it is not shown that an order of supersedeas was issued.

In the case of Sewell v. Daniel, &c., an appeal was granted by the circuit court, and the bond sued on was executed before the clerk within thirty days after the judgment appealed from was rendered. These facts appear from the petition and record, and the petition alleges that an order of supersedeas was issued staying all proceedings on the judgment. This fact is put in issue by the answer. The clerk says he "don't remember of ever issuing any supersedeas;" "if the supersedeas in the suit of Sewell v. Daniel, &c., was ever issued he has no recollection of it."

"The clerk's statements on such an official question, even if competent, do not prove he did not issue the formal supersedeas, but only that he does not remember he did. This is altogether insufficient to prove dereliction of official duty imposed by a directing statute." (Whitehead v. Boorom, 7 Bush, 399.) Further, it appears, by proper allegation and the mandate of the Court of Appeals, that the appeal of Crawford, in the case of Sewell v. Daniel, &c., was affirmed with ten per cent. damages on the amount of the judgment superseded. There is no specific assignment of error questioning the admis-

sion of this evidence, and taken altogether it was strong enough to establish the fact that the order of supersedeas had been issued. When to this we add the facts that Crawford, who took the appeal, and was introduced as a witness by appellant, fails to state that he did not know an order of supersedeas was issued; that Sewell took out no execution on his judgment, and the further consideration that "the object of the Code in requiring the clerk to issue a certificate of supersedeas is merely to notify the appellee that the required bond had been executed and filed, and that his judgment was thereby suspended;" "that the law does not require any record of the issue of the supersedeas," render it almost evident, even without the aid of the mandate of the Court of Appeals, and the presumption that the clerk did his duty, that the order of supersedeas was issued.

We perceive no error in any action of the court to the prejudice of appellants, and the judgment is affirmed.

Separate opinion by Judge Richards, concurring.

The fact that appellants signed the bond in blank, expecting it to be filed for a different purpose, even if established by the proof, would not constitute a defense to the action. If the person to whom they gave their signatures in blank, and entrusted the writing of the bond, has deceived them they can not complain as against the appellee, who was not present and not a party to the imposition.

The Code directs that the clerk "shall issue the supersedeas if the bond be executed." Since the bond in the case at bar was valid the law presumes the clerk did his duty and issued the supersedeas. There was no evidence in the case to overcome this presumption. The effect of the clerk's testimony was simply that he had no recollection of whether it was issued or not; it was worth nothing as evidence for either side. The presumption in favor of the discharge of official duty was rather strengthened by the other circumstances referred to in the opinion of Reid, J.

While, therefore, there was an issue in the pleadings on this question, there was no conflict in the testimony, and the court properly instructed the jury to find for the plaintiff.

John E. Cooper for appellant.

H. C. Lilly for appellee.

## ADDRESS OF LORD COLERIDGE TO THE NEW YORK BAR ASSOCIATION AT THE ACADEMY OF MUSIC, OCTOBER 11, 1888.

After a few introductory remarks his Lordship continued:

"You will understand, therefore, ladies and gentlemen, that I speak as a lawyer, subject, as are all other lawyers, to be revered. (Laughter.) And I speak as a man in the position of a politician who holds, perhaps, in his own country, a somewhat isolated position. I am one of those who never have shrunk, and do not now shrink, from calling themselves Radicals. (Applause.) I am one who, although I admire heartily Mr. Gladstone, support him to the best of my ability, yet find myself more commonly in agreement in political matters with Mr. Bright than with any other living politician. (Great applause.) What I say, therefore, remember that I say for myself only; I speak for no one else, I represent no one else. No one else is bound by what I say, nor responsible for my opinion. If I speak at all it is only because in such a presence as this not to speak would seem churlish and ungracious; and if I do speak I must need try to say what I think to be true. And, ladies and gentlemen, I have been somewhere about two months in your great country, and I have striven, not always, I feel, with complete success, to master the various systems of your jurisprudence. With the distinction between your State courts and your Federal courts I was, of course, by education long ago familiar, but as far as I can make out these are to a foreigner apparently conflicting, and to a foreigner apparently intricate jurisdictions, which I am perfectly satisfied, with all the will in the world, I have not been able adequately to comprehend. (Laughter.) To speak broadly and in a general way, not forgetting that I stand in a State where there is a Code, and that there are States—at any rate there is one State—which walks in the light of Chitty, and by the mild wisdom of Stephens, not forgetting this at all, I still say, speaking generally, that your law is our law, but ours with certain differences in it. You have had great opportunities which have not been open to us; the various forms of proceedure in your States are absolutely independent, in many respects, of one another; the international or quasi-international questions

which, in forms convenient or inconvenient, are constantly arising for solution have given you opportunties of which you have not been slow to avail, broadening and widening and liberalizing your jurisprudence. I would rather express my opinion of American law and American lawyers in the words of a very distinguished friend of mine, the present master of the rolls, who wrote me a letter just before leaving, and from which, with your permission, I will read a single sentence: 'My opinion,' he says, 'of American lawyers and American law is this, that they have the talent for it of their English ancestors; that they began with the possession of the experience of those ancestors, and their immense and various business has often given them the best opportunities of applying the principles of law to it. I hold their decisions in the highest possible respect, and I hope they feel the same for ours, just exceptions on both sides always being excepted.' Now with that judgment of the master of the rolls I may respectfully say that I entirely concur.

## DIFFERENCES IN JUDICIAL SYSTEMS.

"It seems to me that there are one or two other differences which, upon clear, good and entirely uncontradicted evidence, exist between our system and yours. I am told with one voice that our courts in England go faster than your courts in America, and I can not say with what pleasure an old, narrow-minded insular received the intelligence that in any one thing —even in a lawsuit—the old country went faster than the new. (Laughter.) I am told also—and it seems to be the fact—that the judges in England take the liberty of assuming more the direction of affairs in cases which are tried before them, whether with or without a jury, than the practice of some of your States, and the actual statutes in others, permit to the judges in this country. It is not for me to express an opinion as to whether you are right or wrong. From our point of view, and in our circumstances, I can not help thinking we are right; but nevertheless I am not so presumptious as to deny that it is very likely that from your point of view, and in your very different circumstances, you may be right too, because, where the circumstances differ, the conclusions will naturally not be the same. One thing seems to me clear—that in England,

with our fewer judges, we dispose, and dispose without arrears, of a very sufficient and satisfactory number of cases; and in this country, upon the whole, in many States, and certainly, as I understand, in the courts of the Union, there is a very considerable arrear at the present time.

"You are probably aware that we in England have been engaged for the last ten years, beginning in 1873, when, as attorney general, I was responsible for passing the Judicature Act through the House of Commons, in endeavoring to cheapen and simplify and expedite our proceedure upon the lines of those salutary statutes which the wisdom of Parliament enacted about thirty years ago (in 1852-54).

"At this moment a committee, of which I have the honor to be chairman, having reported in favor of certain amendments, the judges have made large alterations in our rules of proceedure, which I hope may be beneficial, but which I am not wise enough to undertake to say will be beneficial; for no man can hope to tell without practical experience what will be the real operation of a new Code of Proceedure. But it was high time that something was done to expedite, amend and simplify the common law. It had become associated in the minds of many men with narrow technicality and substantial injustice. That was not the fault of the common law, but it was the fault, if fault it were, of the system of pleading which, looked at practically, was a small part of the common law, but very powerful men had contrived to make it appear that it was almost the whole of it—that the science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant unless they illustrated some obscure and subtle point of the science of stating those rights.

## A BIG COUNTRY NOT ALWAYS A GREAT ONE.

"The first question which has always been put to me by my kind American friends when I come to a new place is whether I am not amazingly struck with the vast size of this country. Now at the risk of offending my kind friends here I must repeat what I have said elsewhere, that it is not the vast size of this country which particularly impressed me. Indeed, if size is to be considered at all in matters of this sort, I should say

that smallness rather than bigness is the thing to be insisted upon where the results are great. Men are, in human affairs, the great factors of results, and men are great, not in proportion to the largeness, but in proportion to the smallness, of their natural advantages. Size appears to me to be a commonplace incident in the history of a nation. Athens, Rome, Holland, England, all these are places and powers which have affected the destinies of mankind, but every one of them has but a little bit of the earth's surface to stand upon. Nay, one of them had to conquer for herself from the earth's surface something upon which to put her foot. (Applause.) I don't know whether Mr. Cobden ever did say, but if he did I can not agree with him, that the St. Lawrence and the Mississippi and the Amazon were better worth knowing about than the Tiber or the Orontes or the Illysus, because they pour into the sea I don't know how many hundreds of thousands or millions of imperial gallons every hour more than the smaller rivers. I am quite sure that my noble friend, Lord Sherbrook, did once say that the battle of Marathon was not worth knowing about, because the slaughter there hardly reached the proportions of what he called a respectable railway accident, but if the battle of Marathon stayed the tide of the Persian war, and rolled back the waves of barbarian invasion; if the battle of Marathon preserved for us, for you, ladies and gentlemen, and for me, the art, the poetry, the philosophy, the history, the oratory, the intellect, the freedom, of the Greek nation, I say that it was far more worth knowing about than all the fearful slaughters (which rise to the proportion of far more than a hundred railway accidents) of Genghis Khan, Attila, Julius Ceasar, the First Napoleon, four of the greatest slaughterers and butchers that a merciful God ever suffered to sweep over and devastate His earth. (Applause.)

## DEVOTION TO LIBERTY RATHER THAN SIZE.

"Then, after all, let me say about this matter of size—you did not make it. (Laughter.) You were as large when the wild Indians roamed your woods, fished your rivers, hunted your prairies; you were as large when that strange and mysterious people who were before the Indian ruled over this land, with a civilization which has left just as remarkable evidences from Lake Superior down to North Carolina; you were as great

and as large before that, when your huge lakes glittered in the sun or rushed in the wind, with nothing but an occasional mammoth or bison to look upon the glory of their strength. For my part, as I said before, it is not the size of a nation, but it is the products of a nation, that are to be looked at when you consider whether a nation is admirable or not. When you come to size, Russia, I believe, is bigger than you are; Africa is bigger than you are. I speak under correction, but I have some considerable doubt whether the British North American possessions are any smaller. Now, ladies and genlemen, it is the same about your population. Your population is vast, but where does it come from? You are at present—I know there is emigration to Australia, New Zealand and elsewhere—but substantially speaking and broadly, you are the receptacle of the emigration of the world. You, and not I, are the best judge how far this enormous emigration is an unmixed good. You, and not I, are the best judge how far the administration of your towns, how far the integrity of your political system, is or is not favorably affected by this enormous emigration which goes on, and which seems likely to go on for years to come. Let me say, in conclusion upon this matter, that it is not size, it is not force, it is not strength, which constitutes true greatness; but when men rise against oppression; when good, honest, simple, God-fearing citizens go to war, plunge into fierce battle, sooner than suffer the disruption of their country; when they fight their battles, not, as their revilers say, with mercenary armies, but with their own best blood, and with their children's blood, and their children's children's blood ; when they say that what is good for themselves is good for others too; that so far as their power and their dominion exist every man, whatever be his race, whatever be his origin, whatever his color, shall be as free as they are free themselves (applause); when they say that there shall, throughout the length and breadth of their country, be no traffic in human flesh; nay, further, when they try to do justice to every man, when they respect them, when they endeavor to be high-minded and magnanimous toward them; nay, further, when they are not afraid and ashamed to confess and to atone for mistakes and errors; then I say that such men, and the nation

that such men make, are truly, nobly and indistputably great. (Applause.) Forgive a friend, ladies and gentlemen, who tells you that it is not because you are strong, it is not because you are large, it is not because you are energetic, but it is because you have shown that you have the making in you of true greatness, that he admires and respects you. Greatness is cheap at any price; you have paid a price for it that probably no other nation ever paid, but, believe me, you have got what is worth it!

## WEALTH IN AMERICA.

"Now let me be equally frank about your wealth. Those despise riches who despair of them, says Lord Bacon. "Aude hospes," says Virgil on the one hand, "contemnere opes et te quoque dignum finge deo"—grand words indeed! And of which Dryden says: "I contemn the world when I think of them, and myself when I translate them;" but there is no necessary contradiction between these two great men, because if you look at the passage from Lord Bacon which I have quoted you see that he speaks of the use of riches as a thing to be respected, whereas of riches themselves he speaks with scorn enough to satisfy Diogenes. It is not your colossal fortunes that have interested me. I can see them at home. What I do admire, what I long to see and never shall see in my own dear England, is what may be called your upper and lower middle classe. Now there is one word which I am loath to utter. This is the last time I shall ever stand here, or ever see this audience. I thank you from my heart. Farewell." (Loud and long applause.)

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full, and Index of the foregoing opinions reported in full.**

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ACCOMPLICE—See Criminal Law, 24.

ACKNOWLEDGMENT—

KALE v. JEWETT, &c.

Filed October 17, 1883. Appeal from Owen Circuit Court. Opinion of the court by Judge Reid, affirming.

Fraud in procurement of certificate of acknowledgment—Under General Statutes, chapter 81, section 17, the fraud that will let in an inquiry as to the truth of a clerk's certificate of acknowledgment must relate to the obtaining of the certificate itself, and not to the making of the instrument acknowledged.

H. P. Montgomery and Geo. C. Drane for appellant.

D. W. Lindsey for appellees.

ADVERSE POSSESSION—

FIBEL, &c. v. RICHINGS, ADM'R, &c.

Filed October 11, 1883. Appeal from Allen Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

An adverse possession of fifteen years bars an action for the recovery of land, although possession was taken with the avowed purpose of perfecting the title by lapse of time.

J. J. Gatewood for appellant.

AGENCY—

BRUEN v. GRAHN.

Filed October 31, 1883. Appeal from Greenup Circuit Court. Opinion of the court by Judge Reid, affirming.

1. While an agent is competent to prove his own authority when it is by parol, his declarations are not proof of the agency, which must be established aliunde before such declarations are admissible; but where the agency is made out by independent testimony, after the declarations are admitted, any error in that respect is cured.

2. Under a general agency to look after and preserve certain property the agent had the power to employ another to watch and protect the property.

3. An act done or a contract made by one for, or in the name of, another, though without any authority whatever, becomes the act or contract of that other if subsequently adopted or ratified by him.

E. F. Dulin for appellant.

B. F. Bennett for appellee.

ALIMONY—See Costs, 1.

ANTE-NUPTIAL AGREEMENT—See Husband, 1; Wife, 1.

APPEAL—See Costs, 1; Practice in Civil Cases, 2—

(1.) BRUEN v. GRAHN.

Filed October 31, 1883. Appeal from Greenup Circuit Court. Opinion of the court by Judge Reid, affirming.

1. Errors not specifically mentioned in the grounds for a new trial will be treated as waived on appeal.

2. The ground for a new trial that "the court erred in admitting incompetent testimony" is too general to authorize an inquiry as to the action of the court in admitting particular testimony pointed out by the assignment of errors.

E. F. Dulin for appellant.

B. F. Bennett for appellee.

(3.) WALKER, &c. v. TABLER.

Filed October 31, 1883. Appeal from Fleming Circuit Court. Opinion of the court by Judge Reid, dismissing.

When a party has appealed from a judgment against him, and the other party feels aggrieved because the judgment is not for as much as he is entitled to, he should prosecute a cross appeal, and not a separate appeal.

W. H. Cord for appellants.

W. J. Hendricks for appellee.

ARBITRATIION AND AWARD—

GREENWELL v. EMBREE.

Filed October 31, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Reid, affirming.

Where there is a submission to two arbitrators with a provision that if they can not agree a third is to be called in, the inference is that the decision of the two out of the three is to be binding, and that an award made by two of them will be upheld.

Umpire can properly act only in case of disagreement of the arbitrators, and when he does act he is necessarily bound to consult with the arbitrators to learn their differences, and he may act on their representations of the evidence without calling the witnesses.

J. H. Wathen for appellant.

C. T. Atkinson for appellee.

ASSIGNEE—

RADLEY'S ADM'R v. SHOWER'S ADM'R, &c.

Filed October 3, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Reid, affirming.

The assignee of notes executed for the purchase money of land may defeat a prior lien by pleading an estoppel arising from representations to the vendee. The vendee having failed to avail himself of the plea, the holder of the notes executed by him has the right to avail himself of it.

J. P. Hobson for appellant.

A. Ludwig for appellees.

ASSIGNMENT—

FEEBACH v. BRUNKER.

Filed October 17, 1883. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Richards.

1. Assignable instrument—Suit by assignee—An instrument stipulating for the payment of money, together with the performance of other things, can not be assigned so as to vest the right of action in the assignee. In order to render the instrument assignable under the statute it must be for the payment of money or property alone. The fact that the assignee sues only for a breach of the covenant to pay money or property does not affect the case, nor is the principle different where the assignment is not made until after the time has elapsed for the performance of the other covenants.

2. A covenant not assignable before breach can be assigned after breach so as to vest the right of action in the assignee.

3. In an action upon a contract by which the obligor undertook to educate a boy and keep and raise him until he arrived at the age of twenty-one years, and then to pay him a certain sum of money, the contract having been assigned, the assignor should have been a party, although the plaintiff was seeking to recover only the money, and the instrument was not assigned until after the boy became twenty-one years of age.

Kennedy & Kennedy for appellant.

W. P. Ross for appellee.

ATTACHMENTS—

BURCHETT, &c. v. BURCHETT.

Filed October 16, 1883. Appeal from Floyd Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Validity of attachment sale—Mere irregularities in an attachment proceeding do not invalidate a sale under the attachment, the court having jurisdiction of the subject-matter, and of the parties, for the purpose of ordering the sale.

2. Jurisdiction—The jurisdiction of the court in attachment cases depends upon the actual or constructive service of process on the defendant, and not upon the plaintiff's affidavit or the clerk's order.

3. Nonresidents—A nonresident can not show cause against a judgment, for errors therein, after five years have elapsed.

Wellington & Goble for appellants.

W. C. Ireland for appellee.

ATTORNEY—

SHANKLIN v. MEYLER. ante p. 296.

Where an attorney employed to establish a lien upon property, buys a claim adverse to the lien the purchase is void or accrues to the benefit of the client. 296.

BILL OF EXCEPTIONS—

1. DULANEY v. NUNNERY.

Filed October 3, 1883. Appeal from Kenton Circuit Court. Opinion of the court by Judge Reid, reversing.

Bill of exceptions—Instructions—Where the bill of exceptions does not state that it contains all the instructions given in the case, and it is not otherwise shown in the record that all the instructions are before the court, the court will not inquire into the correctness of any of the instructions.

Collins & Fenley, Pryor & Chambers and John & J. W. Rodman for appellant.

A. C. Ellis and J. F. & C. H. Fisk for appellee.

2. CITY OF COVINGTON v. JACK, &c.

Filed October 3, 1883. Appeal from Kenton Circuit Court. Opinion of the court by Judge Richards, affirming.

Time of filing—A bill of exceptions may be filed at any time "during the term at which judgment became final," and the judgment can never become final within the sense of this provision of the statute until the motion for a new trial is overruled.

2. The appellant had the whole of the term at which his motion for a new trial was overruled in which to file his bill of exceptions, and the fact that an order was entered extending the time to a particular day of the term did not curtail this statutory right.

M. L. Roberts for appellant.

Fisk & Fisk for appellees.

BILLS AND NOTES—See Assignee, 1; Assignment, 1.

BOND—See Supersedeas, 1, 3—

PETER v. TAYLOR COUNTY.

Filed October 31, 1883. Appeal from Taylor Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

An action can be maintained against a county to recover judgment on past due coupons on bonds issued by the county, although no mandamus is asked.

2. The holder of the coupon, which is itself a bond made to be detached, can not be required to show the principal bond.

Rhorer & Jones and James Garnett for appellant.

W. E. & S. A. Russell for appellee.

CLERK—See Supersedeas, 2, 3, 4.

CONSIDERATION—See Contracts, 2, 4.

CONTRACT—See Assignment, 1—

1. LANE'S ADM'R v. FARLEIGH, &c.

Filed October 3, 1883. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Conditional promise to pay—An undertaking by the purchaser of a mill to pay the notes executed by him for the purchase money as soon as the property should be released from certain liens thereon, which he was to extinguish by the proceeds arising from the operating of the mill, was absolute, and not merely conditional, leaving undetermined only the date of payment which should not be determined by what was actually made, but by what the mill, prudently operated, would yield.

Geo. C. Drane for appellant.

Winslows for appellees.

2. FORD v. SIDEBOTTOM.

Filed October 3, 1883. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, affirming.

Contract supported by moral consideration—Promise by bankrupt to pay—The moral obligation to pay a debt survives a discharge in bankruptcy, as it does a release wrought by the statute of limitations, and constitutes a valuable consideration for subsequent promise to pay. The fact that in this case the note which the bankrupt promised to pay was made payable to the payee individually, when it should have been made payable to her as administratrix, does not invalidate the promise, which was made to the payee as administratrix, to whom the bankrupt owed the moral obligation to pay, nor does the fact that the promise was without consideration as to another payee in the note affect the right of the administratrix to recover.

Warren Monfort for appellant.

THORNTON v. GUTHRIE & LONG.

Filed October 17, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, granting rehearing and reversing.

Agreement to pay debts of a firm—Certain members of a firm leased their interest in the firm property to appellant, who was to have their share of the profits "after settlement" with the remaining members of the firm, and "to be bound to them for any debts owed by the said firm." Held—That this promise can not be held to bind appellant to pay to the retiring members of the firm a claim for money advanced and work done for the firm, such a claim not being properly a debt against the firm, but proper matter for the "settlement" referred to in the agreement, and although after that settlement appellant may not be entitled to any profits, he can not, under the agreement, be liable to the retiring members for losses.

Little & Slack and E. W. Hines for appellant.

W. N. Sweeney & Son for appellees.

4. WHALLEN v. JUDAH.

Filed October 17, 1883. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Reid, reversing.

Action by third person on contract in his favor—A third person can maintain an action at law in his own name upon a contract made between others in his favor, although no consideration may have passed from him to the promisor, and the party with whom the contract was made is not a necessary party to the action.

5. Set-off—If, before the plaintiff in such an action notified the defendant of his intention to accept the benefits of the contract, the defendant had debts against the party with whom the contract was made, he may set them off, and it is not necessary that he should allege that they arose before he had such notice. It is for the plaintiff to reply that they arose after.

Thomas Lawson and Kohn & Barker for appellant.

Russell & Helm for appellee.

CONVEYANCE—See Acknowledgment, 1.

CORPORATION—

1. L. & N. RAILROAD v. COMMONWEALTH.

Filed October 24, 1883. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Bowden.

Where there are several agents of a corporation having similar powers in a county, any one of the class is a chief agent within the meaning of Civil Code, section 51, subsection 3, relating to service of process.

2. HEINIG, &c. v. ADAMS & WESTLAKE MFG. CO., &c., ante p. 281.

It is a condition precedent to the validity of a corporation organized under General Statutes that the statutory notice should be given, 281.

COSTS—See Personal Representative, 3—

1. BEALL v. BEALL.

Filed October 6, 1883. Appeal from Logan Circuit Court. Opinion of the court by Judge Pryor, overruling motion to correct judgment for costs.

Costs of appeal—The husband having succeeded, upon appeal, in reducing the amount allowed by the lower court to the wife as alimony, a judgment against the divorced wife for the cost of the appeal was proper, the court regarding the amount allowed, looking to the husband's pecuniary condition, as an ample provision for the wife, subject to the deduction of the costs incurred by the husband in reversing the judgment.

Browder & Edwards for appellant.

A. G. Rhea for appellee.

2. McHUGH'S ADM'R v. MECHANICS' MUTUAL SAVINGS ASSOCIATION.

Filed October 10, 1883. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Amended pleading allowed to be filed on payment of cost—An order allowing an amended petition to be filed upon condition that the plaintiff would pay all costs to date should have fixed a time for the payment.

R. D. Handy for appellant.

Root & Wright for appellee.

COUNTY—See Bond, 1.

COUPON—See Bond, 2.

COURTS—See Injunction, 1—

PROCTOR'S GD'N v. TRUSTEES OF MERCER LODGE, &c.

Filed October 3, 1883. Appeal from Mercer Circuit Court. Opinion of the court by Judge Richards, reversing.

1. Guardian's bond—The circuit court has no authority to take a guardian's bond, nor to direct what security shall be given thereon.

2. Where the county court has permitted a guardian to qualify without security, in accordance with the directions of the father's will, and any good reason subsequently exists why the guardian should give security, proper steps should be taken to bring the matter before the county court, which alone has jurisdiction of the matter.

Bell & W lson for appellant.

CRIMINAL LAW—

1. WHITE v. COMMONWEALTH.

Filed October 17, 1883. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

When two or more persons have the joint control or occupancy of premises, one of the tenants may be guilty of suffering gaming on the premises and his cotenants innocent, crime being actual and not constructive.

2. When a witness sustains such relation to the criminal act that he could be jointly indicted with the defendant he is an accomplice.

3. Where there is but one witness, and he is an accomplice, an acquittal should be ordered as matter of law, and there is no distinction as to the application of this rule between an accomplice who may seem inclined to favor the defendant and one who seems disposed to secure his conviction.

4. Upon the trial of appellant under an indictment against him for suffering gaming in a house under his control, the testimony of the only witness showing that he and appellant had joint control of the premises and that he alone was guilty, or that he was an accomplice of the appellant, an acquittal should have been ordered.

Morton & Parker for appellant.

DEED—See Conveyance.

DEFENSES—See Assignee, 1.

DESCENT—

NUNNALLY v. NUNNALLY'S ADM'R.

Filed October 10, 1883. Appeal from Barren Circuit Court. Opinion of the court by Judge Pryor, affirming.

Upon the death of an intestate without children, leaving no father or mother surviving, his estate passed to his brothers and sisters, although they were only of the half-blood.

J. J. C. Eubank for appellant.

DEVISE—See Will, 2, 3—

AVLIS v. SCHLESINER, ante, p. 280.

Devisee may sell a devise in lifetime of testator, provided the latter binds himself not to alter the devise.

DOWER—

MARTIN, &c. v. MARTIN.

Filed October 4, 1883. Appeal from Harrison Chancery Court. Opinion of the court by Chief Justice Hargis, affirming.

The moment the husband accepts a deed conveying to him the fee simple title to land the wife becomes invested with a potential right to dower, which the husband can not defeat by destroying the deed and procuring the grantor to make to him another, containing only a life estate with remainder to others.

A. H. Ward and L. Desha, jr., for appellants.

J. Q. Ward for appellee.

ESTOPPEL—See Assignee, 1.

EVICTION—See Warranty, 2.

EVIDENCE—See Agency, 1; Judicial Officer, 3; Local Option, 1; Supersedeas, 4—

1. COY v. SAYERS, &c.

Filed October 16, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Hines, affirming.

Evidence—The death of one of several coobligors does not render the surviving obligors incompetent to testify for themselves whatever incidental benefit the estate of the decedent may derive therefrom.

Muir & Wickliffe for appellant.

Wm. Johnson for appellee.

2. LANE'S ADM'R v. FARLEIGH, &c.

Filed October 3, 1883. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

One may testify for himself with reference to a transaction with the agent of a deceased person where the agent is still living, or has testified in regard thereto. The authority of an agent to alter, before delivery, a contract which he originally prepared sufficiently appears in this case to permit the other party to testify as to what the agent did at that time.

Geo. C. Drane for appellant.

Winslows for appellees.

3. DILS & SMITH v. PARKER & TOLAND.

Filed October 24, 1883. Appeal from Pike Circuit Court. Opinion of the court by Judge Reid, affirming.

It was too late after the jury was sworn to demand the production of books upon which a deposition was based, the witness and the books being presumably in another State. Had they been in court and properly producible a notice given at the time would have been sufficient; but when not in court, the notice must be given at a sufficient time before the trial to enable the party called on to produce them conveniently.

James M. York for appellant.

O. C. Bowles and L. T. Moore for appellees.

EXECUTION—See Lunatic, 1; Sale, 2—

1. HOPE v. HOLLIS.

Filed October 6, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, affirming.

A motion was the proper remedy to set aside an execution sale of property that was exempt as a homestead, and the fact that a part of the liability was created before the homestead law went into effect is immaterial, as the greater portion of the debt accrued after that time, and the sheriff had no right to sell the homestead for it.

P. B. Muir for appellant.

Simrall & Bodley for appellee.

2. SAYERS v. HAHN.

SAME v. SAMUELS.

Filed October 18, 1883. Appeal from Harrison Circuit Court. Opinion of the court by Judge Pryor, affirming.

2. Execution sale—Title of purchaser—Mere irregularity by a sheriff in making a sale under execution, as the failure to have the property appraised or to have the appraisers sworn, will not affect the title of the purchaser unless the purchaser participates in the irregularity. Where the sheriff exceeds his authority the sale is void, but where he fails to pursue strictly his authority and permit irregularities only, the rule is otherwise.

3. Levy—A levy stating the particular tract levied on, the deed under which the defendant claims, the number of acres, and that the property is known as "Sayer's Depot in Nelson county," is sufficiently descriptive of the property.

4. Time of sale—The fact that the sale was not made between the hours specified in the advertisement, and was made after the sheriff had announced that it would not be made, is not sufficient to invalidate the sale, it not appearing that the defendant was injured thereby.

Muir & Wickliffe for appellant.

Wm. Johnson for appellee.

5. DEMINT v. RINGO'S ADM'R.

Filed October 3, 1883. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Validity of execution levy—To constitute a valid levy on land it is not necessary that the return should be written out and signed when the levy is made.

T. J. McElrath for appellant.

Winslows for appellee.

EXECUTOR—See Personal Representative.

FINAL ORDER—

McLAUGHLIN, &c. v. LIST, &c., ante p 291.

In action to subject land to payment of lien claims the order distributing proceeds of sale is final, 291.

FRAUD—See Acknowledgment, 1; Injunction, 1—

WOODWARD, &c. v. ENDER'S EX'OR.

Filed October 18, 1883. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Lewis, reversing.

Limitation—Pleading—In pleading the limitation of five years to an action for fraud it is not necessary for the defendants to plead or show when the alleged fraud was discovered. It is incumbent on the plaintiff to show that the fraud was not discovered until within five years.

L. D. Husbands for appellants.

C. S. Marshall for appellee.

FRAUDULENT CONVEYANCE—See Husband and Wife, 1—

ALLEN v. GILLILAND, &c.

Filed October 16, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Hines, affirming.

Fraudulent conveyance—To set aside a conveyance as fraudulent there must be not only an intent on the part of the vendor to defraud, but a knowledge of that intention on the part of the vendee; and while, from

the necessity of the case, both of these facts must ordinarily be established by circumstantial evidence, that evidence ought to be potent to overcome the presumption of fair dealing.

Lewis & Farleigh and Kincheloe & Eskridge for appellant.

James G. Haswell and W. P. D. Bush for appellees.

GAMING—See Criminal Law, 1, 4.

GUARDIAN AD LITEM—See Practice in Civil Cases, 5.

GUARDIAN AND WARD—

1. PROCTOR'S GD'N v. TRUSTEES OF MERCER LODGE, &c.

Filed October 3, 1883. Appeal from Mercer Circuit Court. Opinion of the court by Judge Richards, reversing.

Guardian's bond—The circuit court has no authority to take a guardian's bond, nor to direct what security shall be given thereon.

2. Where the county court has permitted a guardian to qualify without security, in accordance with the directions of the father's will, and any good reason subsequently exists why the guardian should give security, proper steps should be taken to bring the matter before the county court, which alone has jurisdiction of the matter.

Bell & Wilson for appellant.

3. HOUNSHELL, &c. v. CLAY FIRE & MAR. INS. CO., ante p. 268.

Guardian can not agree to postpone the right of infants to the right of mortgagee in rents, 268.

HOMESTEAD—See Execution, 1—

1. GAVIN v. SANDERS.

Filed October 4, 1883. Appeal from Barren Circuit Court. Opinion of the court by Judge Pryor, affirming.

Under the General Statutes, where the wife is entitled to a homestead in land owned by her, upon her death that right passes to her husband and unmarried infant children.

Porter & Ritter for appellant.

2. HOPE v. HOLLIS.

Filed October 6, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, affirming.

In a suit for partition between coparceners some of the heirs resisted the partition, claiming that they were invested with title by reason of an adverse possession of more than fifteen years. After a prolonged litigation they were compelled to submit to a partition and to account to their coheirs for use and occupation.

Held—That as against the judgment for rents and costs they are entitled to a homestead in the land allotted to them. The fact that the parties to the litigation originally held the land as coparceners can make no difference, partition having been made.

P. B. Muir for appellant.

Simrall & Bodley for appellee.

3. McLAUGHLIN, &c. v. LIST, &c., ante p. 291.

Where B, a mortgagee, declined to take the purchaser's bonds at judicial sale, and accepted instead the unsecured notes of the purchaser upon a longer credit than provided for in the judgment, and a resale was ordered for a sum not sufficient to pay both B and the mortgagor's claim for homestead, Held—The latter must be first paid, as B had waived his priority by taking the notes, 291.

HUSBAND AND WIFE—See Dower, 1; Innocent Purchaser, 1—

NORSWORTHY, &c. v. SPARKS.

Filed October 4, 1883. Appeal from Calloway Circuit Court. Opinion of the court by Judge Pryor, affirming.

Conveyance based on ante-nuptial agreement—A conveyance from husband to wife, based upon an ante-nuptial agreement by which the husband agreed to secure to the wife the amount received by him from her, was based upon a sufficient consideration, and was not fraudulent as to creditors, although not made until after the husband became embarrassed, there being no allegation that the property conveyed was worth more than the husband had received from the wife.

W. W. Robertson for appellants.

W. H. Smith for appellee.

INDICTMENT—See Criminal Law, 1, 4; Practice in Criminal Cases, 1—

1. L. & N. RAILROAD CO. v. COMMONWEALTH.

Filed October 24, 1883. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

An indictment charging the defendant with the "offense of unlawfully obstructing a public road," and stating the acts constituting the offense, is sufficient without charging a "nuisance;" nor is it necessary to charge that the act done was "to the common nuisance."

2. To constitute the offense of unlawfully obstructing a public road it is not necessary that the obstruction should, as a matter of fact, have prevented the free use of the road. It is enough that it was calculated to do so.

Hill & Alcorn for appellant.

P. W. Hardin for appellee.

INFANT—See Sale of Infants' Real Estate, 1, 3.

INJUNCTION—

PERRY COUNTY COURT v. GODSEY, &c.

Filed October 17, 1883. Appeal from Perry Circuit Court. Opinion of the court by Judge Richards, reversing.

Execution of order of allowance enjoined—The appellees having, by fraud, procured an order of the county court allowing a claim against the county which had already been paid, the county court can maintain an action to enjoin the execution of the order.

John L. Scott for appellant.

INNOCENT PURCHASER—See Execution, 2—

1. ROUNDTREE v. MYERS.

Filed October 3, 1883. Appeal from Hart Circuit Court. Opinion of the court by Judge Reid, reversing.

Husband and wife, by executory contract, sold a tract of land belonging to the wife, and subsequently, for a valuable consideration, conveyed the same land to another person.

Held—That the executory contract of the wife being void, the party claiming thereunder is not entitled to a lien upon the land for the amount he paid thereon, nor has he any cause of action, save against the husband to recover the money so paid.

Porter & Ritter for appellant.

John Donan for appellee.

INSTRUCTIONS—See Bill of Exceptions, 1; New Trial, 1—

1. BRUEN v. GRAHN.

Filed October 31, 1883. Appeal from Greenup Circuit Court. Opinion of the court by Judge Reid, affirming.

An insruction to the jury to find for the plaintiff if they should believe certain facts from th evidence "and all the circumstances proven in the case" could not have misled the jury.

E. F. Dulin for appellant.

B. F. Bennett for appellee.

2. PHILLIPS' EX'OR v. PHILLIPS' ADM'R, ante, p. 270.

In instructing the jury undue prominence should not be given to any fact or circumstance proven in the case, 270.

INSURANCE—

WEISERT v. MUEHL, ante, p. 285.

Policy of insurance payable to heirs of insured can not be devised by insured to anyone else, 285.

JUDGMENT—See Attachment, 3.

JUDICIAL OFFICER—

BAKER v. MORGAN.

Filed October 31, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Richards, affirming.

A justice of the peace acts both as a judicial and a ministerial officer, and, if in the exercise of his ministerial duties he wrongfully does an act which results in damage to another he is liable therefor to the same extent as all other ministerial officers, but if the act complained of is a judicial one he is not responsible for the damage resulting unless the act was beyond his authority, or unless, although acting within the limits of his jurisdiction, he has been governed by malicious or corrupt motives.

2. A justice of the peace in deciding that he had the right to issue an execution upon a replevin bond filed in his court before its maturity, acted judicially, and, although he erred in so doing, the act being within his jurisdiction, he is not responsible unless he acted from impure and corrupt motives, and the ministerial act of preparing and delivering the execution to the officer being the necessary consequence of the judicial act that preceded it, he is not responsible therefor.

3. Testimony of the justice that the surety, who applied for the execution, stated that the principal in the bond said that an execution might issue was competent to illustrate the motives of the justice.

4. An affidavit of the surety in a replevin bond that he believes the principal will dispose of his property before the maturity of the bond does not authorize the issuing of an execution upon the bond before it has matured.

J. C. Wickliffe for appellant.

John S. Kelly and John A. Fulton for appellee.

JUDICIAL SALE—See Mortgage, 2; Sale of Infants' Real Estate, 2—

1. TAYLOR, &c. v. HELM, &c.

Filed October 16, 1883. Appeal from Campbell Chancery Court. Opinion of the court by Judge Pryor, reversing.

Defective title—A report of a sale having been confirmed without exception, the purchaser can not be relieved from the payment of the purchase money upon the ground that the title is defective.

Nelson & Washington and A. Duvall for appellants.

2. SLAUGHTER'S GD'N v. GRAHAM'S EX'OR.

Filed October 30, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Hines, affirming.

Mere inadequacy of price will not authorize a judicial sale to be set aside unless the inadequacy is so great as to import fraud.

3. When the decree of sale directed the officer to advertise the property by posting a notice "on or near" the premises, the return of the officer that he posted a notice "on or near" the property shows a compliance with the decree.

J. Rowan Boone for appellant.

C. B. Seymour for appellee.

JURISDICTION—See Attachment, 2.

JUSTICE OF PEACE—See Judicial Officer, 1, 4.

LIBEL—

NIX v. CALDWELL, ante p. 275.

The rule that information affecting the rights of another may be, in good faith, communicated to that other, applies only where the parties stand in a peculiar relation to each other, as father and son, or principal and agent, 275.

LIEN—See Pledge, 1; Sale, 1.

LIMITATION, STATUTE OF—See Adverse Possession, 1; Fraud, 1; Pleading, 1—

1. MILLER'S ADM'R v. JOLLY.

Filed October 10, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Limitation—Effect of payment by surety—A partial payment upon a note before it is barred by limitation is prima facie an acknowledgment that the residue is unpaid, and of a continuing liability therefor, and suspends the operation of the statute between the accrual of the cause of action and the date of the payment, but this rule does not apply to a surety either when a partial payment has been made by himself or by the principal.

Kincheloe & Eskridge for appellant.

Allen & Murray for appellee.

2. TURNER v. EVERETT.

Filed October 31, 1883. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Richards, affirming.

A promise to pay a demand already barred by limitation creates a new obligation and constitutes a new cause of action.

3. The pendency of an action on the old promise does not prevent the running of the statute against the new promise.

4. BOWMAN v. SIMS, &c., ante, p. 290.

Upon a contract to indemnify B the statute accrues from the time B paid the debt, 290.

5. When the statute accrued on a particular contract, 290.

LOCAL OPTION—

GOFF v. COMMONWEALTH.

Filed October 10, 1883. Appeal from Laurel Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Local option—Evidence—An entry upon the order book of the county court that it appears from the "returns and certificates" that a certain district has "cast a majority of votes against the sale of liquors in said district" is not evidence of that fact. In order that the entry may be evidence it must purport to be a transcript of the certificate of the examining board. Granville Pearl, A. R. Cook and Wm. Lindsay for appellant.

P. W. Hardin for appellee.

LUNATIC—

DEBERICH BROS. & CO. v. REDMAN'S COM.

Filed October 10, 1883. Appeal from Clark Circuit Court. Opinion of the court by Judge Richards, affirming.

Persons holding judgments against a lunatic obtained before he was adjudged to be of unsound mind may enforce them by execution. They can not maintain an action in equity to subject the land of the lunatic.

Haggard & Jones for appellant.

Beckner & Winn for appellee.

MORTGAGE—See Homestead, 3; Separate Estate, 1—

1. HOUNSHELL v. CLAY FIRE & MAR. INS. CO., ante, p. 267.

Mortgagee, when entitled to rents, 268.

2. McLAUGHLIN, &c. v. LIST, &c., ante, p. 292.

Where the land sells for enough to pay the mortgaged debt, mortgagor is discharged from personal liability, 292.

MOTION—See Execution, 1.

NEGLIGENCE—

SHITTENHELM'S ADM'R v. LOUISVILLE & NASHVILLE RAILROAD CO.

Filed October 18, 1883. Appeal from Boone Circuit Court. Opinion of the court by Judge Pryor, affirming.

Where those in charge of a train had an unobstructed view of a person

on the track several hundred yards off they had the right to believe that he would leave the track in time to save his life, and were not guilty of negligence in not attempting to stop the train until within about 100 yards of him.

O'Hara & Bryan for appellant.

Wm. Lindsay for appellee.

NEW TRIAL—See Appeal, 1, 2; Practice in Criminal Cases, 2, 4—

HALLORAN'S ADM'R v. L. C. & L. R. R. CO.

Filed October 11, 1883. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Chief Justice Hargis, granting rehearing and reversing.

Peremptory instruction—Grounds for new trial—Where the court has instructed the jury peremptorily it is not necessary to assign the action of the court in so doing as a ground for a new trial, in order to raise the question on appeal. A motion to instruct the jury peremptorily is in effect a demurrer to the evidence.

F. T. Fox for appellant.

Wm. Lindsay for appellee.

NONRESIDENT—See Attachment, 3.

NOTICE—See Corporation, 2; Evidence, 3; Partnership, 1; Receiver, 1.

PARTNERSHIP—See Contract, 3—

DILS & SMITH v. PARKER & TOLAND.

Filed October 24, 1883. Appeal from Pike Circuit Court. Opinion of the court by Judge Reid, affirming.

Persons with whom a firm has been accustomed to deal not having personal notice of the dissolution of the firm are not affected by it.

James M. York for appellants.

O. C. Bowles and L. T. Moore for appellees.

PARTITION—See Homestead, 2.

PENSION—

LUTHEY, &c. v. BACON, &c.

Filed October 24, 1883. Appeal from Gallatin Circuit Court. Opinion of the court by Judge Richards, reversing.

Although pension money is exempt in the hands of the pensioner from seizure for his debts, he can not dispose of it by will to the exclusion of his creditors.

J. J. Landrum for appellants.

Lindsay & Tiller and W. H. Roberts & Winslow for appellees.

PERSONAL PROPERTY, RECOVERY OF—See Supersedeas 1, 2.

PERSONAL REPRESENTATIVE—See Phillips' Ex'or v. Phillips' Adm'r, ante p. 270—

1. LARKIN, &c. v. CRAWFORD.

Filed October 30, 1883. Appeal from Grayson Circuit Court. Opinion of the court by Judge Lewis, reversing.

Where at a public sale by an executor, pursuant to the will directing the property to be sold and the proceeds divided among the devisees, the executor became the purchaser for third parties under an agreement to

bid for them, the devisees have the right to have the sale set aside, whether they were in fact prejudiced or not, the executor having placed himself in antagonism to their interests.

J. S. Wortham and McHenry & Hill for appellants.

A. B. Montgomery and G. W. Stone for appellee.

2. MILLER v. MOOK, &c.

Filed October 10, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Reid, affirming.

Power of executor to mortgage—A testator empowered his executor to sell his home place in the event it should be necessary in order to provide for the maintenance of his widow and children, and, after buying a less expensive home, to invest the surplus proceeds in lands and devote the income to the support of the widow and children. Held—That the executor had no power to mortgage the home place to provide for the maintenance of the widow and children. The testator having provided how the maintenance should be furnished the executor had no power to adopt another mode.

Kincheloe & Eskridge for appellant.

Allen & Murray for appellees.

3. PHILLIPS' EX'OR v. PHILLIPS' ADM'R, ante p. 270.

Executor attempting in good faith, and upon reasonable grounds, to probate the will is entitled to recover his costs out of the estate, 270.

PLEADING—See Fraud, 1 Taxation, 1—

1. MILLER'S ADM'R v. JOLLY.

Filed October 10, 1883. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Exception in statute—When a saving, exception or proviso in a statute is not in the same section which confers the right, it is a matter of avoidance and need not be anticipated by the pleader claiming the benefit of the statute. When the time during which there was no one authorized to sue is sufficient to defeat the plea of the statute of limitations, it is incumbent on the plaintiff to set it up in his reply.

Kincheloe & Eskridge for appellant.

Allen & Murray for appellee.

THORNTON v. GUTHRIE & LONG.

Filed October 17, 1883. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, granting rehearing and reversing.

Pleading—Petition on account—In an action upon an account an allegation that the defendant "is indebted" is only a legal conclusion. Merely filing the account as part of the pleading can not dispense with allegations that the work was done for the party at his request, or that the material charged for was sold and delivered, or some allegation of express promise, or of facts from which a promise is implied.

Little & Slack and E. W. Hines for appellant.

W. N. Sweeney & Son for appellees.

PLEDGE—

ASSIGNEE OF SAVINGS BANK OF LOUISVILLE v. GRAND LODGE OF KENTUCKY.

Filed October 13, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Hines, reversing.

Equity—Pledge by treasurer of lodge without authority—Ratification—Money having been borrowed by the Grand Treasurer of the Kentucky Grand Lodge of Masons, upon the faith of a certificate of stock belonging to the lodge, deposited by him as collateral security, and the money actually expended by him for the use and benefit of the lodge with the knowledge and approval of its officers, in an action by the lodge to recover the stock the holder should have been adjudged to be entitled to a lien on the stock to secure the payment of the sums borrowed by the treasurer, although he may not have been authorized to pledge the stock when he did so. The lodge having come into a court of equity seeking relief should be required to do equity.

John and Thomas Speed for appellant.

Barrett & Brown for appellee.

PRACTICE IN CIVIL CASES—

1. CARTER BROS. & CO. v. PHELPS, &c.

Filed October 16, 1883. Appeal from Washington Circuit Court. Opinion of the court by Judge Hines, affirming.

The filing of amended pleadings is always a matter of sound discretion for the court, and that discretion will not be revised unless it has been abused.

L. R. Thurman for appellants.

Breckinridge & McChord for appellees.

2. LANE'S ADM'R v. FARLEIGH, &c.

Filed October 3, 1883. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Appellate practice—Partial transcript—Upon appeal from a judgment in a proceeding under chapter 3 of title 10 of the Code, the judge of the inferior court is alone empowered to direct what part of the record shall be copied, and the appellant has no right to file a schedule and bring up a partial transcript such as he may designate, but as both appeal and cross appeal are presented on the partial transcript in this case the court will assume that it contains all of the record relevant to the issues presented, and will not dismiss the appeal of its own motion.

Geo. C. Drane for appellant.

Winslows for appellees.

3. McHUGH'S ADM'R v. MECHANICS' MUTUAL SAVNGS ASSOCIATION.

Filed October 10, 1883. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

It was erroneous to dismiss the petition without prejudice merely because the plaintiff declined to file her amendment on terms given, when the pleadings theretofore filed showed that she was entitled to judgment for a sum admitted.

R. D. Handy for appellant.

Root & Wright for appellee.

4. TURNER v. EVERETT.

Filed October 31, 1883. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Richards, affirming.

The finding of a chancellor upon issues purely legal is to be treated as the verdict of a properly instructed jury, and can not be set aside unless flagrantly against the testimony.

5. SHUCK v. RIGGS.

Filed October 24, 1883. Appeal from Marion Circuit Court. Opinion of the court by Judge Reid, reversing.

It is not necessary that a defendant should have been judicially found to be of unsound mind to enable the court to appoint a guardian ad litem for him. The court has the power in the progress of the case to hear and determine the question whether the defendant is of unsound mind just as it has the power to hear and determine any other fact.

Rountree & Lisle for appellant.

S. A. Russell for appellee.

PRACTICE IN CRIMINAL CASES—

1. CRAIG v. COMMONWEALTH.

Filed October 17, 1883. Appeal from Anderson Circuit Court. Opinion of the court by Judge Reid, affirming.

Exception—The appellant having failed to except to the fact that the indictment was not read to the jury, or to the statement by the attorney for the Commonwealth of the charge contained in the indictment, the error can not avail him.

2. An error in overruling a motion for a new trial in a criminal case is not ground for reversal, as it is not the subject of exception.

J. W. Jones for appellant.

J. S. Morris for appellee.

3. DRAKE v. COMMONWEALTH.

Filed October 24, 1883. Appeal from Muhlenburg Circuit Court. Opinion of the court by Judge Richards, affirming.

A judgment in a misdemeanor case can be reversed only for an error of law apparent on the record to the prejudice of the appellant.

4. The decision of the court upon a motion for new trial in such cases is not subject to exception, and any error in that respect is not a ground for reversal.

F. M. Allison and W. H. Yost for appellant.

P. W. Hardin for appellee.

5. SELLARDS v. COMMONWEALTH.

Filed October 30, 1883. Appeal from Lawrence Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

No reversal can be had because of the refusal of the court to allow a witness to testify, the appellant having failed to except.

6. Where a party has a legal opportunity of strengthening or explaining a fact in the case and fails to avail himself of it, or to show his inability for a valid reason to do so, it is a fair subject for remark or candid argument upon the part of counsel.

7. The attorney for the Commonwealth ought not to have been allowed to allude to other indictments against the accused, but, in view of the facts in this case, the accused was not prejudiced by his action in so doing.

8. Where there has been merely a momentary separation of the jury in a felony case, and it is clear that no improper influence was exercised over the jury, it is not proper to grant a new trial on the ground of separation.

L. T. Moore for appellant.

P. W. Hardin for appellee.

PRESUMPTION—See Supersedeas, 4.

PROCESS—See Sale of Infants' Real Estate—

L. & N. R. R. v. COMMONWEALTH.

Filed October 24, 1883. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Where there are several agents of a corporation having similar powers in a county any one of the class is a chief agent within the meaning of subsection 3, section 51 of the Code.

Hill & Alcorn for appellant.

P. W. Hardin for appellee.

PURCHASE MONEY—See Vendor and Vendee, 1.

RAPE—

SELLARDS v. COMMONWEALTH.

Filed October 30, 1883. Appeal from Lawrence Circuit Court. Opinion of the court by Chief Justice Hargis, affirming.

Where an indictment for rape charged that the offense was committed "forcibly" and against the "will and consent" of the female, it was not error to omit the word "forcibly" from the instructions. The statute lays down several modes of committing the offense, either or all of which may be charged in the indictment, and if any of those charged be proved, though not all, it is not error to instruct the jury that they may convict.

L. T. Moore for appellant.

P. W. Hardin for appellee.

RECEIVER—

PRICE, &c. v. PRICE.

Filed October 3, 1883. Appeal from Hardin Circuit Court. Opinion of the court by Judge Reid, reversing.

The parties to be affected by the appointment of a receiver must, in some way, have notice of the motion to appoint. An order appointing a receiver in this case, made before the parties to be affected thereby were before the court, is void.

Montgomery & Marriott for appellants.

Hayes & Bush for appellee.

RENTS—

1. HOUNSHELL, &c. v. CLAY FIRE AND MAR. INS. CO., ante p. 268.

Mortgagee, when entitled to, 268.

2. Guardian can not postpone right of infants in rents, to mortgagee, 268.

REPLEVIN—

BARKER v. MORGAN.

Filed October 31, 1883. Appeal from Nelson Circuit Court. Opinion of the court by Judge Richards, affirming.

An affidavit of the surety in a replevin bond, that he believes the principal will dispose of his property before the maturity of the bond, does not authorize the issuing of an execution upon the bond before it has matured.

J. C. Wickliffe for appellant.

John S. Kelly and John A. Fulton for appellee.

SALE—See Attachment, 1—

1. McDOWELL v. NEAL, &c.

Filed October 10, 1883. Appeal from Robertson Chancery Court. Opinion of the court by Judge Pryor, affirming.

Sale of expectancy—The expectation of inheriting can not be made the subject of a grant, there being an entire absence of any subject-matter to be conveyed, and the mere consent of the ancestor to the sale can not make the grant valid. Nor is the grantor estopped by reason of his warranty to make the defense. The contract being void, the warranty is void also.

The grantee in such a case is not entitled to a lien on the property for the money advanced. The grantor having no power to convey, has no power to create a lien.

W. P. Ross and O. S. Deming for appellant.

W. Buckler and A. Duvall for appellees.

2. ALVIS v. SCHLESINGER, ante, p. 280.

Sale of expectancy by heir or thing not in esse is invalid, and where the deed conveying it was not put to record until, the ancestor dying, an execution had been levied on the share of the heir, the execution prevails over the deed, 280.

SALE OF INFANTS' REAL ESTATE—

1. SCHULER v. MAYO.

Filed October 30, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Pryor, affirming.

Where the father, mother or guardian of an infant is prosecuting a claim for his own benefit against the infant, he should not be permitted to bring the infant into court by service of process on himself. There being no provision in the Code, prior to the amendment of January 16, 1882, for a case where the plaintiff in the action was the only person upon whom process could be served for the infant under section 52 of the Code, it was proper in such a case to pursue the ancient practice of actual service on the infant, and the appointment of a guardian ad litem to defend.

2. Where the Code has been strictly pursued and the purchaser has parted with his money and the sale has been confirmed, the fact that the person upon whom process was served for the infant was the plaintiff in the action, prosecuting a claim hostile to the interests of the infant, will not render the sale void.

3. The regular defense by the guardian is a sufficient compliance with subsection 3 of section 36 of the Code.

A. A. Stoll and G. A. Winston for appellant.

J. S. Pirtle for appellee.

SEPARATE ESTATE—

HOUNSHELL, &c. v. CLAY FIRE & MAR. INS. CO., ante, p. 267.

Mortgage given by the wife for money borrowed to pay for land conveyed as her separate estate binds the land though the money was not all used to pay off the mortgage, 267.

SET-OFF—See Contract, 5.

SHERIFF—

EVERITT, &c. v. BOHM BROS. & CO.

Filed October 3, 1883. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Richards, affirming.

Sheriff and sureties—Attachment of money in sheriff's hands—Where money received by a sheriff in his official capacity is attached in his hands, and the attachment is sustained, and he ordered to pay the money to the attaching creditor, his sureties are liable for his failure to comply with the order. The fact that the person entitled to the money is changed by an order of court subsequent to the issuing of the execution does not affect the liability of the sureties.

W. H. Holt for appellants.

Tyler & Hazlerigg for appellees.

STATUTES, CONSTRUCTION OF—See Taxation, 1.

SUPERSEDEAS—

1. FOWLER, &c. v. GORDON, &c.

Filed October 10, 1883. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Reid, affirming.

In an action for the recovery of specific personal property, and for damages for its detention, a judgment was rendered for the value of the property which was superseded. Upon appeal the judgment was affirmed, the court holding that the failure to render judgment in the alternative for the return of the property or its value, in the event a return could not be had, was not a reversible error. In an action upon the supersedeas bond it is held that the tender to the plaintiff of the personal property sued for in the action in which the bond was executed is not a good defense.

2. A successful appellee may sue on the supersedeas bond without issuing execution on the affirmed judgment, and no demand is necessary.

E. E. McKay for appellants.

M. Mundy for appellees.

3. LINDON, &c. v. SEWELL.

Filed October 17, 1883. Appeal from Breathitt Circuit Court. Opinion of the court by Judge Reid, affirming. (See this case reported in full, ante, p. 304.)

Supersedeas bond—When a supersedeas bond is signed in blank and delivered to the clerk of the circuit court to be filed up, the cerk thereby becomes the agent of the parties executing bond, and when he fills it up it is a valid bond.

4. Issuing of supersedeas—In an action upon a supersedeas bond the statement of the clerk that if the supersedeas "was ever issued he has no recollection of it," is not sufficient to overcome the presumption that he did his duty.

John E. Cooper for appellants.

H. C. Lilly for appellee.

SURETY—See Limitation, Statute of, 1—

TAXATION—

1. McARTHUR v. CITY OF DAYTON.

Filed October 11, 1883. Appeal from Campbell Chancery Court. Opinion of the court by Judge Pryor, reversing.

Recovery of tax—Pleading—To recover the amount of a tax imposed where the statute gives the court jurisdiction, it is essential to aver and show a compliance with every duty necessary to the imposition of such a burden.

Jesse Arthur for appellant.

Wm. Lindsay for appellee.

2. CITY OF PARIS v. MORAN, &c.

Filed October 30, 1883. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Richards, affirming. Presiding Judge Bowden, dissenting.

Statutes having for their object the raising of revenue by taxing the citizen should be strictly construed; and where the taxing power is conferred upon a municipal corporation it must be exercised within the limits of direct authority. No inference or presumption can be indulged to extend it beyond what is positively granted.

3. An act authorizing the city of Paris to levy a tax for school purposes upon the "assessed property" within the city must be construed as embracing only such property as could be legally assessed by the corporation for other purposes, and, therefore, does not embrace lands used for agricultural purposes only and remote from the settled portions of the city.

Dissenting opinion by Presiding Judge Bowden.

The term "assessed property," as used in the act authorizing the tax for school purposes, was intended to refer to the charter according to its terms, and meant that whatever by those terms was directed to be assessed for city purposes should be assessed for school purposes, and was not intended to restrict the tax for school purposes to such property only as the courts might determine that the legislature had the power to tax for ordinary purposes.

L. K. Elliott for appellant.

G. C. Lockhart for appellees.

TENDER—See Supersedeas, 1.

TRUSTEE—

HENDRIX'S EX'ORS v. HARDIN.

Filed October 31, 1883. Appeal from Bath Circuit Court. Opinion of the court by Judge Richards, affirming.

A voluntary trustee is entitled to a reasonable compensation for his services, although none is stipulated for in the deed.

R. Gudgell & Son for appellants.

Reid & Stone for appellee.

USURY—

KALE v. JEWETT, &c.

Filed October 17, 1883. Appeal from Owen Circuit Court. Opinion of the court by Judge Reid, affirming.

The chancellor will always purge a transaction of usury when either the pleadings or proof shows the usury. It is not necessary to plead it.

H. P. Montgomery and Geo. C. Drane for appellant.

D. W. Lindsey for appellees.

2. WARTON v. WARTON, ante, p. 302.

A note given for the purchase price of land may be made to bear interest until maturity at a greater rate than the legal rate, 302.

3. A claim should be purged, whether usury has been pleaded or not, 302.

VENDOR AND VENDEE—

ARNOLD v. MAIDEN.

SAME v. TILFORD.

Filed October 11, 1883. Appeal from Ohio Circuit Court. Opinion of the court by Judge Pryor, reversing.

Failure of title—Vendees who purchased upon the faith of the vendor's representations that his title was good are entitled to have the purchase money refunded, it having turned out that their vendor had no title whatever. The fact that the vendor conveyed with covenant of special warranty did not relieve him of his obligation to make the title good, as represented.

McHenry & Hill for appellant.

Wm. Lindsay for appellees.

VERDICT—

P. & E. R. R. CO. v. McLEAN, &c.

Filed October 31, 1883. Appeal from Muhlenburg Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Either party to an action has the right to demand a special verdict only, and the court has no discretion in the matter.

P. H. Darby and Holmes Cummins for appellant.

Eaves, Yost & Jackson for appellee.

WARRANTY—See Sale, 1; Vendor and Vendee—

1. ARNOLD v. MAIDEN.

SAME v. TILFORD.

Filed October 4, 1883. Appeal from Ohio Circuit Court. Opinion of the court by Judge Pryor, reversing.

By a covenant of special warranty the grantor undertakes that he has a legal title, good against the Commonwealth, but refuses to guaranty that there is no adverse claim superior to his.

2. Eviction—A judicial sale to a third person with a writ of possession issued was a sufficient eviction. The parties were not compelled to wait until they were turned out by the sheriff.

McHenry & Hill for appellant.

Wm. Lindsay for appellees.

3. OFFUTT, &c. v. BRADLEY.

Filed October 13, 1883. Appeal from Scott Court of Common Pleas. Opinion of the court by Judge Pryor, affirming.

Breach of warranty—The appellants can not maintain an action to recover money paid by them for land merely because there has been a recovery against their remote vendee, it not appearing that they have been made liable upon their warranty or have paid a dollar to any one by reason of the loss of the land to the subpurchaser, who, it appears, has compromised the judgment against him.

Darnaby & Johnson and J. E. Cantrill for appellants.

A. Duvall for appellee.

WILL—See Devise, 1; Pension, 1; Personal Representative, 2, 3—

1. PHILLIPS' EX'OR v. PHILLIPS' ADM'R, ante, 270.

Testamentary capacity defined, 270.

2. HENEY'S EX'OR v. HENEY'S EX'OR, ante, p. 283.

Particular devise construed, 283.

3. Testator may provide that a particular devise shall be reduced by amount of property of the devisee held by testator, 283.

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The following abstract of a decision recently made by Judge Barr, in the U. S. Circuit Court, will be found of interest and importance to the bar throughout the State.

UNITED STATES v. MOORE.

1. The penalties imposed by section 5485 apply to the demanding or receiving for services in a pension case a greater sum than $10.

2. Fraud and extortion constitute no part of the offense of demanding or receiving an illegal fee. The fact of its demand or receipt completes the offense.

3. The limitation is as to the compensation for services. Money advanced, and actual expenses incurred in prosecuting the claim may be reimbursed.

4. When a pensioner receives his money he has the right to do with it as he pleases, except that he can not pay more than $10, either directly or by any device of loan or gift, for services rendered in his pension case.

Indictment under section 5485, Revised Statutes, as amended by Sup. R. S., Vol. 1, pp. 386 and 602.

Geo. M. Thomas and Geo. DuRelle for the government.

Samuel McKee and John L. Scott for defendant.

THE

# KENTUCKY LAW REPORTER AND JOURNAL

VOL. 5. DECEMBER, 1883. No. 6

## CURRENT TOPICS.

A correspondent of the London Times, writing of "American Law and Lawyers," says: "Every American is proud of the Supreme Court of the United States, the 'best court in the world,' one lawyer said to me—worthy to be ranked with the Brooklyn Bridge and the American system of checking baggage, which I found to be the accepted tests of human perfection.

"A score of legal institutions dead and buried in England are here alive. Ghosts from Tidds' Practice walk the earth. I have my doubts whether John Doe is extinct in some of the States. If our old Serjeants rose from the dead they would find themselves much more at home in the courts of Jersey City than in the Palace of Justice."

He attended the trial of a case in a State court, and gives the following as his impression of the judge:

"The judge, I could see, was of less account, the advocate of more account, than in an English court. The former was, indeed, treated with respect. His rulings were accepted, but there was no obsequious eagerness to propitiate him. His demeanor was in some respects novel to me. He took no notes —in fact there was an official reporter. He rarely interfered

with the examination of the 'witness on the stand,' as the witness, who did not stand, but sat, is termed. He read the newspapers ostentatiously; opened his letters coram publico; walked out of court while the advocates were haranguing; walked in again to see what was going on, and, not being interested, disappeared again for a short time. But the decorum of the audience was admirable. Silence was kept in a way of which I had no experience. The judge's remarks, if few, were very much to the point; and in most respects the trial compared very advantageously with one in our own courts. One could not but be struck, on this occasion as on others, by the reticence, tested by English standards, of the judges. They interfere rarely; and I was again and again asked to account for what was irreverently styled the garrulousness of the English bench. All that I saw of the State judge was favorable. They are badly paid. They are not always men of great culture."

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General Pryor, of New York, who was employed to assist at the trial in London of O'Donnell for murder, has been excluded by a ruling of the presiding judge, on the ground that a criminal could not, at common law, be represented by counsel, and the statute which provides that he may make defense "by counsel learned in the law" is construed to refer to English counsel only.

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Chief Justice Appleton, of Maine, who has made the subject of evidence a special study, insists that "there is no reason why an attorney should not be a witness or why confessions made to him should be held more sacred, when required for the purpose of justice, than those of a patient to his physician, a principal to his agent, a father to his son, a cestui que trust to his trustee; or when the principal is subject to examination, why his attorneys, his agent, should be exempt, or why the knave and the criminal should be permitted to enjoy the aid of one on whose secrecy they may implicitly rely, whatever the fraud to be committed or the crime to be defended."

The lord chancellor of nEgland receives $50,000 annually; the chief justice, $40,000; master of the rolls, $30,000; the attorney general, $35,000; solicitor general, $30,000. There are seventeen landed proprietors who draw incomes from their estates of $500,000 and more, the largest being the Duke of Norfolk, who has about $1,400,000 annually.

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The quarters soon to be taken possession of by the New York Court of Appeals in the new Capitol building at Albany are thus described in the Albany Law Journal: "These rooms are in the third story, over the governor's, in the southeastern corner of the building, are amply lighted, and command a superb view of the river and the eastern hills. The courtroom is completely lined with oak, with a heavy timber ceiling, and a grand fireplace, backed by the most exquisite Mexican onyx. The judges' desk is a beautiful example of carving. The adjoining rooms, for libraries, consultation, and toilette purposes, and those allotted to the bar, are all that could be desired. The court have made an excellent exchange in declining the rooms originally assigned them, which were dark, cheerless and inconvenient in comparison with these. Now we hope the judges will adopt gowns when they take up their new quarters. We know gowns are not popular, and that is one reason why we would recommend them. We rather like a judicial uniformity in dress as well as in decisions. The judges of the highest court in this country wear gowns, and no one scoffs at them. The gown is a much more dignified garment than the average coat, be it 'claw-hammer,' 'frock,' 'Prince Albert,' 'cut-away,' or what not. In warm weather, too, it admits an ex parte style of dress (so to speak) underneath, which is not without its advantages. We are in no danger in this country of degenerating into formalism, but rather of losing respect for courts and pulpits through familiarity and a lack of elevation. Thus, a Western judge has recently issued an order that attorneys and others shall not smoke in his court room, carry into it partly smoked cigars, or put their feet upon chairs or tables!"

The suggestion about uniformity in dress is a good one—not that such a thing can supply the want of learning, dignity or

any of the more substantial qualities that make a good judge, but a certain degree of formalism is becoming to such high officers and is calculated to inspire and preserve that respect for the bench to which it is entitled.

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We have been requested to call the attention of the bar of the State to the rule (or rather request) of the Superior Court, that counsel shall file, at least a week before a case set for oral argument is called, a brief statement of all the points intended to be relied on in the argument. This is intended to enable the judges to post themselves in advance of the hearing upon the general bearings of the case. By this means attorneys have the advantage of addressing a more intelligent court and of discovering what particular turn the mind of any member of the court has taken and an opportunity of meeting it, which is, in effect, the full benefit of a rehearing.

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Now that the legislature is about to meet, it is hoped that some one who has influence among them, indeed some lawyer who is himself a member, will take up the condition and needs of the State Library and secure an appropriation full and generous enough to put on the shelves all the volumes that ought to be there in order to keep the collection abreast with the times. All are supposed to know the law, and yet this parsimony on the part of the State renders it impossible even for the bench and bar to do so.

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## NOTES OF CASES.

In Jones v. Fuller (South Carolina Supreme Court) the neighbors and friends of the lady's family were allowed to testify in her action for breach of promise of marriage as to what damages, in their opinions, she had sustained by reason of the breach. This seems to be qualifying a lady as a sort of expert in these cases.

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It is a very familiar case where the owner of stock killed or injured by a railroad train sues to recover the value of the stock,

but it is a rare case where the railroad sues the owner of the stock to recover for injury to the train caused by its coming in collision with the stock allowed to run at large. Such is Annapolis, &c., Railroad Co. v. Baldwin (Maryland Supreme Court), and the company is allowed to recover; the defendant was held guilty of negligence in allowing the stock to run at large, and the injury to the train was not too remote a con- that negligence to bar recovery. (Housatonic R. Co. v. Knowles, 30 Conn., 313; Hannibal, &c., R. v. Kenney, 41 Mo., 272; Sinram v. P., F. W. & C. R., 28 Ind., 244; Drake v. P. & E. R., 51 Penn. St., 240.)

There is quite a conflict of opinion upon the question whether one who holds a policy of insurance upon his own life can make a valid assignment of the policy to another, who has no interest in his life (such as a relative or creditor has). The courts of New York, Vermont and Rhode Island hold that such an assignment is valid, as the policy is only a chose in action, and is governed by the rules which apply to other contracts (St. John v. American Mut. Life Ins. Co., 13 N. Y., 31; Clark v. Allen, 11 R. I., 439; Fairchild v. Northeastern Mut. Life Ass'n, 51 Vt., 618). But in Indiana, Pennsylvania, this State, Massachusetts, Kansas and the U. S. Supreme Court such an assignment is held invalid because it is dangerous to human life to give a stranger an interest in the death of another. And as one can not take out a policy directly upon the life of one in whom he has no interest, so he can not obtain such a policy by the indirect mode of assignment (Franklin Fire Ins. Co. v. Hazzard, 14 Ind., 116; Stevens v. Warren, 101 Mass., 564; Warnock v. Davis, 104 U. S., 775; Bayse v. Adams, ante 91; Gilbert v. Moose's Adm'r., Penn. Sup. Ct., 1883). But it is allowed that a policy may be taken out upon his own life payable to one who has no interest in his life (Lemon v. Phœnix Mut. Life Ins. Co., 38 Conn., 294). The difference in principle between taking out the policy directly for the benefit of a stranger (which is held valid) and assigning the policy to him after it is taken out (which is held invalid) is not very plain.

## II.

## THE LAST YEAR'S WORK IN THE COURT OF APPEALS.

### VOLUME 4, KENTUCKY LAW REPORTER AND JOURNAL.

In the last number we gave a brief summary of the most important cases decided by the Court of Appeals between June and December, 1882; below we give those decided between January and April, 1883:

In Bridgeford, Trustee v. Barbour, &c., page 470, A collected rents from a tract of land, which was held by him, along with other heirs, in coparcenary and undivided. He failed to account to the other heirs for their shares of the rent, and when the land was divided they constitute a lien on his portion for the rents unaccounted for. A had, in the meantime, assigned all his property for the benefit of his creditors, and his assignee claimed that, though the heirs might enforce such a latent equity against A himself, they could not enforce it as against his assignee. The court held that, although the claim of the heirs did not, in strictness, constitute a lien, yet a court of equity would not grant a partition of the land without first directing an account and compelling the party applying for partition to answer for the rents. This did not apply, however, where the coparcener, who was in default for the rent, had transferred his share in the land to a purchaser for a valuable consideration, but an assignee for the benefit of creditors was not such a purchaser, and any equity good against his assignor would be good against him. Consequently the assignee in this case must first satisfy the claim of A's co-heirs for the rent before he could take A's share of the lands.

In Paine v. Woolley, page 489, a very interesting question is presented:

A sues B for $12,000, but obtains judgment for $1,200 only (speaking in round numbers); dissatisfied with this amount he takes an appeal from the judgment, because it did not allow him the larger sum. While the appeal is pending he issues execution and enforces the collection of the whole $1,200; thereupon B moves to dismiss the appeal because A had, by enforcing the judgment, accepted his rights under it. The court

sustained the motion and held that where a party in whose favor a judgment is rendered enforces it in full, he can not afterwards prosecute an appeal from it. This rule applies alike to a judgment at law or in equity, but to the latter only where it is for an indivisible sum. But to the rule there are three exceptions: First, where the judgment is voluntarily satisfied—the act of defendant in voluntarily paying the judgment obviously can not affect his adversary's right by barring the appeal; second, where it is only partially enforced, for although paying the judgment in full extinguishes it, yet leaving a part unpaid, however small, keeps it alive and is a basis on which the appeal can rest; third, where the judgment is for a sum which has been admitted by appellee to be due, but the appeal is from the refusal of the court to adjudge a balance over and above the admitted sum. This is held in the case of Campbell v. Cin. S. Ry., page 499, which follows next after Paine v. Woolley. In anyone and all of these cases issuing the executions is no bar to the appeal. The case has been criticised, but although unsustained by any authorities in this State it seems amply supported by numerous cases in other States. Some of them hold the execution a bar to the appeal because it is inconsistent with the further prosecution of the appeal. One can not claim rights under a judgment and at the same time seek to set it aside. Others of the cases are based on the idea that the judgment is satisfied and extinguished by the levy of the execution, and, therefore, there is nothing to appeal from.

But it is objected to the decision that Civil Code, section 742, provides that an appeal shall not bar proceedings on the judgment unless a supersedeas is issued, and, therefore, it is urged that, as there was no supersedeas in this case, merely issuing execution can not bar the appeal. But the court held that this section applies only to an appeal prosecuted by defendant, and not to an appeal by plaintiff, as in this case.

Then it is objected that the case of Merriam v. Haas, 3 Wall., 687, is in conflict with the decision. This seems not to be the fact, for that case is embraced within the third exception given above, viz., that where the defendant admits a certain sum is due, plaintiff may issue execution therefor without prejudicing his appeal from the judgment refusing a larger sum.

But it is again objected that there being no cross appeal by defendant the judgment could not be interfered with for his benefit or in his behalf. It is true the judgment could not be reversed in his interest unless he had taken a cross appeal.

But a cross appeal can have no effect on the hearing of a motion to dismiss. The motion is determined without regard to the fact of whether there is or not a cross appeal. Indeed the taking of a cross appeal is entirely immaterial except the fact that it is not taken, is an incident from which it might be argued that defendant admits the justice of the judgment against him, and, therefore, he ought not to complain because plaintiff enforces it at once, even while the appeal is pending asking for a larger sum than the judgment allows.

But aside from the authorities it must be confessed the question is a close one. For the plaintiff it may be urged that it is a great hardship to keep him out of money found due him by the judgment, and that, too, when defendant may become insolvent and the money thus lost. True, it is said he may protect himself by an attachment, but that requires bond and surety, and if he is poor he can not give it, and his poverty is a double misfortune.

But for defendant it may be said he should not be harrassed with an execution requiring him to pay a judgment at the same time with an appeal from that very judgment which he has satisfied, and which appeal may result in requiring him to pay even a larger sum; and then, too, the insolvency argument is on his side also, for if the judgment be reversed and the plaintiff held entitled to recover nothing, he may in the meantime have become insolvent and not be able to repay the money already collected. True he might have stayed execution by supersedeas, but he may be (like plaintiff with the attachment) too poor to find a surety. The equities being so strong on each side, the court might well fortify itself behind the authorities.

In Coke, &c. v. Gutkese, page 545, it is held that, although the tenant is ordinarily obliged to keep the premises in repair, and, therefore, can not complain if an accident happens to himself or one of his family by reason of the defective condition of the premises, yet if the landord at the time of the renting knew that on account of a hidden defect a portion of

the premises was in such a dangerous condition that injury to the tenant would be inevitable, and he failed to disclose the defect, he is liable to the tenant for any injury suffered by him.

In Ellmore v. Ellmore's Adm'r, page 622, it is held that the acceptance by the widow of dower or any interest devised to her in lieu of homestead destroys the homestead as to both mother and children, but the death of the mother or the mere abandonment by her of the homestead does not affect the rights of the children.

Walker v. Smyser, page 622, presents a very interesting case relative to the jurisdiction of courts of chancery. Property was conveyed to A in trust for B (a married woman) for life, with remainder to her children, but with power in the trustee to sell the property and re-invest the proceeds if B should request it, and he, the trustee, deemed it to her interest to do so, but he might require a petition in chancery to be filed, and on such petition being filed (the deed provided that) the court should order the sale. B requested the trustee to make the sale, but he refused to make it unless B brought the suit, which she did, and it was held therein that courts of chancery have no inherent power to order the sale of property of persons under disability; such power is conferred by statute; and when the court has no jurisdiction of the subject-matter the acts or agreements of the parties can not give jurisdiction, therefore, the direction in the deed that the trustee might require a petition to be filed, and that thereupon the court should order the sale, does not avail to give jurisdiction. But the court has power to compel a recusant trustee to act, and as in this case it appears that B made the request and A admitted in his answer that he knew her interest required the sale, but he had refused to make it, the court has jurisdiction upon the facts to order the sale.

In Smith v. Wilson & Co., &c., page 719, where an attachment was levied on certain land and the wife of the debtor came in and claimed a homestead in the land, and the court merely determined that she was not entitled to the homestead, but did not ascertain the amount of the debt due plaintiff, but referred the case to the commissioner to audit the accounts, Held—An appeal by the wife was premature, as the opinion of the court that she was not entitled to homestead was not a final order.

In Thweatt v. Bank of Hopkinsville, page 547, a tract of land having been conveyed to the bank of Hopkinsville, it was held that a bank has no power to acquire title to real estate or to hold it except for two purposes: First, as a security for loans made by the bank; second, just enough real estate to provide itself with a banking house. And as the tract of land here conveyed was for neither of these purposes, it is held that the grantee, the bank, took no title. However, the legislature had passed an act providing that (for certain reasons set forth in the preamble) the deed to the bank should be good and effectual to pass title, and the validity of this act is the main question in the case. But it is objected that the act could give no new strength to the title of the bank unless it appeared that the grantor in the deed consented to it. The court held that the grantor having executed and delivered the deed by which he evidenced a clear intention to convey the land and pass the title to the bank, and that intention having failed to take effect because of the inability of the bank to acquire title, the act is to be considered, not as conveying any right of the grantor, but simply as removing that inability of the grantee which prevented the existing deed from being effectual. The act in effect carries out the intention of the grantor, and vests the title in the bank. The general rule is said to be that where a law operates on existing contracts, but only for the purpose of curing a defect which frustrates the intention of the parties to the contract, the law is not invalid as interfering with vested rights.

In Deitz's Assignee v. Sutcliffe, &c., page 567, it is held that where A, induced by B's fraudulent representations, sells him goods upon credit, upon discovering the fraud A has his election, first, to sue in detinue for the specific recovery of the goods; second, in trover for their value and detention; third, in contract upon the quantum meruit count for their reasonable value.

He recovers the same thing, the reasonable value of goods, whether he sues in trover or in contract, but it is of advantage to base his suit on a contract, because he is then entitled to an attachment (Civil Code, section 194, subsection 2) upon grounds which would not be sufficient if the action were in tort.

Forest v. Crenshaw, &c., page 592, decides an important point of practice. It is held that the instructions must be

either embodied in the bill of exceptions or made part of the record by order of court. It is not enough to designate them by number in the bill and say (here insert them), even though the clerk does actually copy them into another part of the record.

In Pearcy, &c. v. Greenwell, &c., page 587, it is held that a devise to A, upon condition that he pays in one and two years a certain sum to B, is not forfeited for failure to pay the money as required. The law favors vested estates, and will never construe a devise to be upon a contingency and dependent upon the performance of some act as a condition precedent unless the intention of the testator so requires. And where there is no devise or limitation over to take effect upon failure to perform the condition, such failure never forfeits the estate, whether it be upon condition precedent or subsequent.

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## KENTUCKY COURT OF APPEALS.

[The following opinion was filed December, 1882, but was afterwards withdrawn and modified, and has just been refiled in its present form:]

## DUKE'S HEIRS, &c. v. DUKE'S DEVISEES, &c.

(Filed December 7, 1882.)

1. Separate estate—The Revised Statutes did not alter the character of separate estate but merely regulated the manner in which it might be alienated, providing that it could not be sold or encumbered with or without the husband's consent unless by order of a court of equity. But it might be disposed of by will, or, if a gift, alienated by and with the consent of the donor.

2. No specific words are necessary to create a separate estate except it must appear from the language of the conveyance that the intention was to place the property beyond the control of the husband and all others.

3. Separate estate may be created to take effect at once, during an existing marriage, or to take effect in the event of a future marriage; it may extend to a particular coverture or to any number of covertures.

4. As husband and wife may convey her general estate to a trustee to be reconveyed as her separate estate, so they may convey, in the first place, directly to the trustee for him to hold as her separate estate without the necessity of reconveying to her.

5. The judgment of a court authorizing a married woman to act as a feme sole does not extend beyond the existing, into a subsequent marriage.

6. Where a married woman is given an estate in remainder to become separate estate in the event of her marrying again, it is held that, in the mean-

**time, during her existing marriage she may dispose of the remainder as her general estate. It does not become separate estate and subject to the restrictions imposed on the alienation of such estates until she marries again.**

**Upon this last proposition Judge Pryor dissents and holds that:**

**Under the Revised Statutes, where property is conveyed to a married woman for her separate use, but excluding the rights of future husbands only and not her present husband, she can not during her present marriage, or even during her widowhood, convey the property as general estate. It is at all times subject to the restrictions imposed upon the alienation of separate estates.**

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines.

This is an appeal from the judgment of the circuit court directing the probate of the will of Mrs. Duke as to certain real and personal estate and rejecting it as to other estate owned by her, and which she had attempted in the will to dispose of. There is also a cross appeal in which it is insisted that the court erred in rejecting any portion of the will.

Mrs. Duke was married twice, her first husband being Robert S. Price, and her second Duke. She died, leaving no children by either husband. This contest is between the devisees under the will of Mrs. Duke and her heirs, and involves an inquiry as to whether, by certain conveyances, Mrs. Duke held a separate estate in the property embraced in the conveyance; and, secondly, whether a decree, obtained during her coverture with Price, authorizing her to trade as a feme sole and to dispose of her property by deed or will, operated to continue her power of disposition beyond the lifetime of Price.

The provisions of the Revised Statutes, which were in force at the time of the making of the will by Mrs. Duke, and which apply to this case, are as follows:

Chapter 47, article 4, section 27: "If real or personal estate be hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, she shall not alienate such estate, with or without the consent of any husband she may have; but may do so, when it is a gift, by the consent of the donor or his personal representative.

"Such estates, heretofore created, shall not be sold or encumbered but by order of a court of equity, and only for the purpose of exchange and reinvestment, for the same use as that

of the original conveyance or devise; and the court shall see that the exchange or reinvestment is properly made."

Chapter 106, section 4: "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a special power to that effect."

The first conveyance we will consider is that from George Riley, the father of Mrs. Price, to R. S. Price in trust for Mrs. Price, the material portion of which is as follows:

"The said George Riley conveys all the said land to said Robert Price as trustee for the said Prudence and her heirs, and the said Robert Price being entitled to his lifetime in said land; but it is fully understood the said land is not to be held in no way bound for any debts or contracts of said trustee, and said land is not to be sold only for the said proceeds to be paid over to the said Prudence and her heirs, and applied to the purchase of other lands, will be bound for as the above, the title to the said Prudence and her heirs; and the said George Riley warrants and forever defends the title of said land to the said Robert Price, trustee, from all persons claiming under him."

The provisions of the statute quoted do not alter the nature or character of separate estate. The character of the estate is to be determined as it was determined prior to the adoption of the statutes, the only effect of the statute being to regulate the manner of its use and the method of its alienation. Under those statutes, considered in connection with other provisions of the same revision, a feme covert may bind her general estate for necessaries for herself and family, when the contract is evidenced by writing signed by herself and husband, but she can not will it; while her separate estate can not be bound or subjected in any way except in the exercise of a special power for any contract made by her, but it may be willed.

In order to create a separate estate at common law, or under the statute, the language of the deed or devise must clearly manifest an intention to place the property beyond the use or control of the husband or anyone else. No specific words are necessary to the creation of such an estate, but the intention to accomplish the object indicated must be manifest in the writing. It is also a question of intention, where the conveyance or devise is made during coverture, as to whether

the restriction on the character of the estate is to be continued beyond the coverture then existing. A separate estate may be created where the donee is discovert, to take effect in the event of a future marriage; it may be made to extend to a particular coverture, or to any number of coverture, and that without regard to whether the instrument under which the estate is held was executed before or during coverture. It is always a question of intention with the conveyor or devisor. Under this rule it is manifest that the deed of trust does not create a separate estate in Mrs. Price, even during the lifetime of her then husband, because it did not create an estate in the wife which was exclusive of all other persons. It gave to the husband a life estate unqualifiedly, to which he would not have been entitled except in case there had been children of the marriage. But, in addition to this, there is nothing in the deed to indicate an intention to exclude any future husband from his marital rights, and, therefore, as against any future husband, the deed does not create a separate estate, or, in other words, the separate estate, if created, which we think is not the case, existed only during the life of the first husband.

The other deed under which it is claimed that Mrs. Price, subsequently Mrs. Duke, was entitled to a separate estate was executed by Price and wife to Anthony, in trust for certain purposes, and the material provisions of it are as follows: "Whereas, the said Prudence is anxious and determined to secure the benefit of said land to the use and benefit of said husband, Robert S. Price, during the term of his life, and should he have children, then to himself and children; and in the event that she should survive him, then to her own separate use and benefit."

It is clear that under this deed Robert S. Price held a life estate, and that in the event he had children by his then wife, who should survive the wife, the estate should go to them, but that in case the wife survived, a separate estate should remain in her. As we have already suggested, such an estate may be created to take effect upon a future marriage, but in the time intervening the estate in the feme is absolute; and this applies as well when the estate is created during one coverture, but is not to take effect until its expiration, as when it is created in a feme sole. There

can be no such thing as a separate estate which is operative in the absence of a conjugal tie. The sole idea of a separate estate is the exclusion of the husband's control. An estate may be created in a woman, whether married or single, with the restraint of alienation, as could be done as to anyone, and the terms upon which the estate is held by her need not be different, but when the estate created in the woman is a separate estate under the modern common law, as in this instance, the restraint upon alienation is to be determined by the character of the estate, because, as we have already said, the nature of the estate has not been changed—only the method or manner of its alienation. (Perry on Trusts, 3d edition, sections 651, 652, 653; Brown v. Alden, 14 B. Monroe, 143.)

If these conclusions be correct, there was no separate estate in Mrs. Price when she subsequently made her will while the wife of Duke, because during the Price coverture, the husband and wife uniting with the trustee, Anthony, conveyed the land in fee to Baird, reserving a life estate to R. S. Price, and Baird reconveyed to Price and wife the fee simple title, the survivor to take the whole. If then, as we have concluded, the separate estate did not attach during the Price coverture, the power of alienation was complete at the time the conveyances were made, and they operated to reinvest Mrs. Price and her husband with the fee, which under the statute could not be willed. The estate conveyed by Price and wife to Anthony was the wife's general estate, and the power to make this separate estate has already been determined by this court. It was decided by this court in Parrot, &c. v. Kelly, &c., 3 Ky. Law Rep., 269, that a feme covert could convey her general estate, by joining with her husband, to another, for the express purpose of having a reconveyance to the wife's separate use, and that such use would be effective. If such an estate may be thus avowedly created by indirection, there appears no reason why it may not be directly created by conveyance to a trustee. There is nothing in the policy of the law in the one case that does not exist in the other.

Revised Statutes, chapter 47, atricle 4, section 27, already quoted, does not apply to or restrain the power of alienation

because the separate estate had not attached at the time the conveyance was made by Price and wife and the trustee, Anthony, to Baird.

The conclusion, therefore, is that, although the conveyance by Price and wife in trust to Anthony created a separate estate in Mrs. Price, that as it was to take effect in the future, it was destroyed by the conveyance to Baird, and from Baird to Price and wife, and was general estate in Mrs. Duke at the time she attempted to will it, and that under the statute this land did not pass by the will.

The next question to be considered is whether the decree obtained during the life of Robert S. Price, and on the joint petition of himself and wife, authorizing the wife to trade as a feme sole and to dispose of her property by will or deed, impressed the character of separate estate upon her property which continued to operate during the second coverture. The manifest object of the statute was to provide for the wife and family against the improvidence or incapacity of the then husband. There is nothing in the statute, or in its policy, that indicates an intention that the decree should operate after the termination of the circumstances that gave it birth. The legislature might have provided that it should continue, and. in that case, the character of separate estate would have been permanently impressed upon the property, and any subsequent husband would have no more power over it than the one in whose lifetime the decree was obtained. It is not to be presumed that the court, in making the decree under the peculiar circumstances of that marital relation, determined that any other such relation that might exist in the future would be of the same character—that the next husband would necessarily be improvident or incapable of providing for his family. The decree ceased to be operative after the death of Price.

The judgment is reversed on the appeal and affirmed on the cross appeal, with directions for further proceedings consistent with this opinion.

Judge Pryor dissenting.

October 8, 1883, the following modified opinion was delivered by Judge Hines:

The court being equally divided in opinion as to whether the land referred to in the deed from Price and wife to Anthony, trustee, remained separate estate in Mrs. Duke, the opinion of the court below adjudging it to be separate estate and that it passed under the will is affirmed. In other respects the judgment of the court below is reversed on the appeal and affirmed on the cross appeal.

Judge Pryor delivered the following opinion:

The question in this case involves the right of a married woman to dispose of her estate by last will and testament, and this involves the further question as to whether the estate devised was her separate or general estate. If her general estate, the devise is void; if her separate estate, it must be held valid. The feme covert, Mrs. Duke, owned several tracts of land. She had been twice married, died without children, and left at her death her husband surviving her, to whom she devised the greater part of her estate for life, with remainder to the Masonic Widows and Orphans' Home, etc.

The first husband of Mrs. Duke was Robert Price, and by a conveyance to Robert Price as trustee, from his wife's father, George Riley, she, the wife, was invested with the title to a tract of land containing two thousand and seventy-five acres, subject to the life estate of the trustee and husband, Robert Price. This conveyance did not vest the wife with a separate estate, and, therefore, she had no power to dispose of this particular tract of land by will, but it passed to the next of kin, and in this conclusion there is no division of opinion among the members of this court, and the court below, therefore, erred in adjudging that Mrs. Duke had the right to dispose of it by will.

The father of Mrs. Duke (then Price) made a last will by which he gave to Mrs. Price (now Duke) one-half of a tract of land known as the home place, on the Henderson road, containing eight hundred acres. The land was divided, and Prudence Price, while in the possession of her part of the land, and being anxious, and, as she says, determined to secure the use and benefit to her husband, Robert Price, of the land during his life, etc., on 21st of December, 1850, executed, in conjunction with her husband, a conveyance to William Anthony, by

which she conveyed to him in trust this tract of land, to be held by the said Anthony for the use and benefit of her said husband, Robert Price, during his life, and should he have children, then to himself and his children; and in the event she should survive him, then to her own separate use and benefit.

On the 15th of December, 1865, Robert Price and Prudence (now Duke) his wife, and the trustee, Anthony, in consideration of love and affection, conveyed this land to James Baird, describing it as containing 375 acres, more or less, reserving a life estate in Price and wife, and any children they might have.

On the 21st of October, 1872, Baird reconveyed this land, in consideration of another tract conveyed to him, to Robert Price and wife, and to the survivor of them.

Mrs. Price survived her husband, and afterwards married Duke, to whom she devised the land for life, remainder to the other appellee named in the deed. If the title of Mrs. Duke is to be determined by this last deed, made on the 21st of October, 1872, then it was her general estate, and she had no power to devise it—while, on the other hand, if the estate held by her in this land was a separate estate by reason of the conveyance made to Anthony in trust on the 21st of December, 1850, then under the provision of the Revised Statute, which must control this case, she had no power to sell it, and being separate estate she could dispose of it by last will.

Chapter 47, article 4, section 27, Revised Statutes, provides: "If real or personal estate be hereafter conveyed or devised to the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may hereafter have, she shall not alienate such an estate with or without the consent of any husband she may have, but may do so when it is a gift by the consent of his donor or his personal representative. Such estate heretofore created shall not be sold or reconveyed, but by order of a court of equity, and only for the purpose of exchange and reinvestment for the same use," etc.

Chapter 106, section 4, provides: "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a special power to that effect."

By the deed of the 21st of December, 1850, the trustee was vested with no power to sell, and the conveyance to Mrs. Price

was to her own separate use and benefit. She had, as this court heretofore decided she had the right to do, converted her general estate into separate estate, and not only so, had conveyed the estate to her husband (through this trustee) for life and then to his children, and if he died without children, then to her separate use, the very language being used necessarily creating a separate estate. She then held by the terms of the deed a vested interest in remainder, subject to be defeated in the event her husband died leaving children.

The separate estate Mrs. Price had in the land was created by the deed to Anthony in trust. That conveyance defines the extent and character of the estate she held in the land; if general estate, she could not will it; or if separate estate, she could not convey it. Suppose Mrs. Duke (then Price) had survived her husband (Price) without selling the land and died without marrying a second time, making a will disposing of this land, can it be doubted but that it would have passed the title, and for the reason that she was disposing of an estate that had been conveyed to her separate use? Then, with an estate she had the right to dispose of by will, she undertakes, in the face of the statute, to dispose of by deed, the statute expressly prohibiting the alienation of any such estate with or without the consent of any husband she may have. It was not to the exclusion of the husband she then had, because he had a life estate in the land by the terms of the deed she had executed. It was to the exclusion of any husband she might thereafter have, and because it was sold during the life of the first husband it is maintained that the separate estate, or the right to its use not having attached, the conveyance passed the title. The statute prohibiting such a sale and conveyance does not say that the use must have attached or the right to the enjoyment must exist, else the right to sell is not prohibited. It is the estate conveyed or devised to the separate use of the wife that can not be sold, and if a separate estate it is immaterial whether its enjoyment depends upon a contingency or the married woman is at the time in possession, or whether the title is a vested or contingent remainder, if it is an estate conveyed to her separate use she can not convey it.

We can look to the rule of the common law to determine what words are necessary to constitute a separate estate, but the right of alienation is expressly prohibited, whether the conveyance be to a married or unmarried woman, if separate estate to the exclusion of any husband she may have, she can not dispose of it by deed, but may by will.

It is argued that this deed of trust to Anthony does not create a separate estate during the life of her then husband, because it did not create a separate estate in the wife to take effect upon a future marriage, and that there can be no such thing as a separate estate which is operative in the absence of a conjugal tie. In this conclusion we can not concur. A conveyance to an unmarried woman, to the exclusion of her husband or any she may have, would doubtless at the common law have vested the grantee with the right to sell, that is, although conveyed in that way she could dispose of it as her absolute estate. She might bind the estate by her contract, whether married or unmarried, but the mode of alienating or encumbering such estates was entirely changed by the Revised Statutes, and if separate estate, whether the woman was married or unmarried, she could not alienate it without the consent of the donor or by application to a court of equity, and then for purposes of reinvestment. If conveyed, reads the statute, to the separate use of a married woman, or that of an unmarried woman, to the exclusion of any husband she may hereafter have, she shall not alienate it.

It is the character impressed on the estate that made it inalienable under the Revised Statutes, and it was not a question as to whether the feme was married or unmarried when the effect of the conveyance was to exclude the husband, whether the then husband or any future husband, the power of alienation was taken from her by the statute. The estate was created when the conveyance was made. Its character is given to it by that instrument, and whether an estate for life, or fee simple, a vested or contingent remainder, what Mrs. Price obtained was a separate estate, and with such an estate if she had married Duke without ever having disposed of it, he, as husband, could not have asserted any right to it by reason of the marital relation. A married woman and her husband at

no period during coverture, under the Revised Statutes, could have alienated her separate estate, and whether the deed under which she held had the effect to exclude her husband then living or some future husband is not a question affecting the right of Mrs. Duke to dispose of this estate by last will and testament.

In 1849 Michael Flynn, for the consideration of love and affection, conveyed to Francis Quinn a lot of ground in Louisville in trust and to be for the sole and separate use and benefit of his said wife, Mary Ann Flynn, her heirs, etc., but all the rents and profits accruing during the life of the grantor to remain free from all claim or demands whatever of his wife and appertain to her said husband. Mary Ann Flynn died in the year 1880, having made a will by which she devised this lot for certain objects and purposes mentioned. She left no children, but her heirs at law brought an action against Michael Flynn and Bishop McClosky to recover of Michael Flynn the property and divest the latter of title. It was insisted in that case that Mrs. Flynn was not invested with such an estate as she could dispose of by will, she being a married woman. This court in passing on the question said: "If the character of separate estate was imparted to the property by the deed in trust the testator had the right to dispose of it by will," and after determining that it was separate estate proceeded to say: It is not the right to the present use and enjoyment of the property that determines a separate estate, but it may be created and exist without reference to the quantity of interest in the property or the time of its enjoyment. It is sufficient if the feme covert have the sole and exclusive right to the estate devised.

If the opinion delivered on the hearing prevail a separate estate can not be created in a vested or contingent remainder in the wife when the husband is the owner of the particular estate. The husband and wife might not be prohibited by the common law from selling such an estate, but under the provisions of the Revised Statutes the husband and wife could not dispose of it. The conveyance to Baird passed no title, and having been reconveyed, Mrs. Duke had the power of devising it to the appellees, and could have done so even if there had been no reconveyance, as Bird was without title. There is no

controversy, however, in this case between Baird and the devisees of Mrs. Duke.

The will as to this land passed the title to the devisees. Judge Hines was not present when the case of Thompson v. McClosky, 4 Ky. Law Rep. and Journal, 899, was decided.

Wm. Lindsay, Stuart & Atchison and Jolly & Todd for appellants.

Owen & Ellis, W. N. Sweeney, Williams & Powers and Jas. S. Pirtle for appellees.

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## JOHNSON, &c. v. SWEATT, &c.

(Filed November 6, 1883.)

**Husband and wife—Under General Statutes, chapter 47, article 2, and also under act 23d February, 1846, the husband has no estate in (during her lifetime), and no power of alienation over, the wife's lands, and, therefore, where he has conveyed them, she may sue at once, even during his lifetime, and recover them back again.**

Appeal from Butler Circuit Court.

Response of the court by Judge Hines to petition for rehearing.

This is an action by husband and wife to recover possession of land belonging to the wife, which the husband sold in 1848, the wife not joining in a conveyance. The question presented is: Does a cause of action arise on behalf of the wife until the death of the husband? The determination of that question depends upon the construction of the act of February 23, 1846 (Acts 1845 and 1846, page 43). That act provides that the land of the wife shall not be "subject to the debts of the husband, or be levied on, or attached or sold, or executed, for any of his debts, created or arising either before or after marriage;" and further provides that the husband and wife, by joint conveyance, may dispose of the land of the wife. Prior to the adoption of that statute it had been held that the husband could sell and convey the land of the wife so as to be operative during the life of the husband, and consequently that in such case the wife's right of action did not accrue until the death of the husband (Miller v. Shackleford, 3 Dana, 292). The General Statutes, chapter 47, article 2, expressly provide that the husband shall have no interest in the land of the wife except the

right to rent not exceeding three years. Under this statute there is no question that the husband has no power of alienation of the lands of the wife, and we think it is equally as true in regard to the act of 1846. In that act the husband is by implication restrained of any right in the lands of the wife, except such as comes to him by curtesy, while in the General Statutes it is said in terms that the husband should have no interest in such lands, except to rent as stated. The provisions of the act of 1846, exempting the lands of the wife from the debts of the husband, necessarily convey the idea that the husband has no interest in the land which is transferable by him, otherwise he must be construed to hold a beneficial interest which is vendible, not subject to his debts, contravening the spirit of the act of 1792, re-enacted in the General Statutes, chapter 63, section 21, which holds that all property held in trust shall be subjected to the debts of the person for whom it is so held. Petition overruled.

L. J. Simth and E. W. Hines for appellants.

Wm. Wand for appellees.

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## BRANSOM, &c. v. THOMPSON, &c.

(Filed November 3, 1883.)

**1. Power of attorney—Where A and wife executed a power of attorney to B, authorizing him to sell any part or the whole of her undivided interest in certain lands, it is held that a subsequent division of the lands does not revoke the power.**

**2. Statute of limitations—Where the husband undertakes to convey his wife's lands, the possession of his vendee is amicable to the wife, and the statute of limitation does not run against her except that she can not bring any action after thirty years have elapsed. Thirty years bars all claims, notwithstanding the disability of the claimant. It does not, however, bar a remainderman whose right does not accrue until the death of the life tenant.**

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Pryor.

Matthew Lyon died many years ago, leaving several children surviving him, and the owner of a large tract of land, then in Caldwell but now in Lyon county, that descended to three children. One of his daughters became the wife of Clark S. Bransom, and in March, 1852, Bransom and his wife executed a power of attorney to one Quarles, employing him to sell and dispose of any part or the whole of their undivided interest in

the lands of Matthew Lyon lying in the counties of Caldwell, Marshall, Ballard and McCracken, or elsewhere in the State.

Proceedings were then in progress for the division of the land between the children, and after the execution of the power of attorney a division was made. The commissioner allotted to Mrs. Bransom the land in controversy in this action.

The land was sold by the attorney in fact to Francis Lyon, and the present appellee claims to hold as the vendee or the subvendee of Francis Lyon.

Mrs. Bransom died about the beginning of the year 1879, leaving her husband surviving her and several children.

In an action instituted by the vendees in possession for a division of the land under the commissioner's deed the children of Mrs. Bransom sought by a petition filed to be made defendants to that proceeding. They were made defendants, and by appropriate pleadings sought to recover the land in controversy (250 acres) upon the ground that their mother was an infant married woman when the power of attorney was executed; that it was, therefore, void, and the defendants holding under her are without title.

After the marriage of Mary Ann Lyon, the mother of the appellants, to Bransom, one Skinner, who had been her guardian, still continued to control the land as the agent of Bransom and wife, renting the lands out and placing tenants on the premises. There is no doubt of the possession or seizure of Mrs. Bransom as early as 1851, and during the coverture until the deed made under the power of attorney. There is some question made in the pleadings below as to the validity of the division of the land between the heirs of Matthew Lyon, but at best the proceedings were only informal and the possession under the division is, as between the heirs, a complete confirmation of what was done by the commissioner, and whether acquiescence in the division has been pleaded or not the possession under it until 1852 is sufficient to make it valid in the absence of some allegation of fraud or bad faith practiced upon those who labored under disabilities at the time the division was had, nor do we adjudge that such relief could be given at this late day. The division being made, the power of attorney passed the title but for the disability of Mrs. Bran-

som, and the attorney in fact being authorized to sell the undivided interest of Mrs. Bransom in the whole land. The fact of it being afterwards divided did not revoke the power, for the purpose of its execution was to authorize the attorney to sell, the division then being in progress.

The only question remaining to be considered on the appeal of the children of Mrs. Bransom is that in relation to the interest of their father in the land. Was he a tenant by the curtesy? If so, the children are not entitled to the land until the death of their father, the life tenant, and this was the judgment rendered below, of which they complain. They maintain that their father has no interest, as there was no seizin in the mother at her death, and they are, therefore, entitled to the immediate possession.

If the rule of the common law was changed by the Revised Statutes as to what constitutes a tenant by the curtesy, and we think it was not, a question not necessary, however, to be decided in this case, as the wife was seized of the land prior to the adoption of the Revised Statutes, and the husband by reason of the marriage acquired an estate for their joint lives in the land, and the fact that he parted with his interest did not affect the manner of holding by the wife, and his vendee was possessed in and for the wife just as the husband would have been if no sale had been made.

The holding and the possession by the vendee of the husband was amicable to that of the wife, and was in fact the possession of the wife.

No limitation begins to run against the wife except under the thirty years' statute by reason of a sale by the husband, and the doctrine that one obtaining possession from the husband of the wife's land must return that possession at the husband's death applies still unless the thirty years' statute prevents him. (Gregory v. Ford, 5 B. Monroe, 471.)

The case of Medlock v. Suter, 3 Ky. Law Rep., 763, is certainly misunderstood by counsel on both sides.

There is a point at which no right of action exists for the recovery of land, or rather where the right of action is barred, and this is fixed at thirty years, although the party making the sale was laboring under a disability at the time of the same. The disability of infancy or coverture, or both com-

bined, will not stop the running of the thirty years' statute. If an infant or a married woman sells her land with or without the consent of the husband, and the party is placed in possession and holds the land or those claiming under him for thirty years, then the statute provides that no recovery shall be had, with the further provision that if the disability did not exist at the time of the sale the right of entry or the right to sue existed. To illustrate, if the husband and wife sell, the wife being an infant or feme covert, a possession for thirty years under the sale would bar a recovery by the wife or her heirs, because if she was under no disability the title would pass and no cause of action could exist, or if the sale of the absolute fee was by the husband alone, the wife could not sue, because if at the time of the sale by him her disability had been removed the right of entry would exist. The thirty years' statute does not apply where the cause of action has not accrued, as where the tenant for life sells, the remainderman can not sue until the termination of the life estate, but where there is a sale, or the party entitled could have sued but for the disability of infancy or coverture, the thirty years' statute runs because the disability under that statute affords no protection. This is not the rule applicable to any other statute, and the thirty years' statute was enacted so as to prevent them from recovering for no other reason than that they were infants or feme coverts when the cause of action accrued. This statute denies the right of entry after thirty years and says that no disability will permit it, if you had a cause of action, provided no disability existed, and it was in that light the case of Medlock v. Suter, supra, was decided.

The thirty years' statute having no application to this case, as the time had not expired, the possession under the sale by the husband, although not binding on the wife, was the possession of the wife, and at the death of the wife the husband was entitled to the curtesy or those to whom he had sold. There was the marriage, the birth of living children and the seizin of the wife. The judgment below was, therefore, proper, denying to the appellants the possession until their father's death, and as they are only here on the question of costs, cancelling the conveyance by their mother, the court below erring

in that particular only, we will not reverse upon such a ground. (Carr v. Givens, 9 Bush, 679.)

Judgment affirmed.

R. W. Wake and J. G. Husbands for appellants.

Wm. Lindsay, T. J. Watkins, P. H. Darby, F. A. Wilson, Wm. Marble and F. W. Darby for appellee.

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## FITZPATRICK, &c. v. COMMONWEALTH.

(Filed November 17, 1883.)

1. Murder—Evidence that the perpetrator of a deliberate murder is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing that the act is wrong, is inadmissible.

2. It is no excuse for murder that the perpetrator has not power to control his actions when aroused or in a passion. It is the duty of men who are not insane or idiotic to control their evil passions and violent tempers or brutal instincts, and they are responsible for not doing so.

3. Threats—A mere threat, even if made by a lawless and desperate man, is no excuse for taking his life.

Appeal from Adair Circuit Court.

Opinion of the court by Judge Hargis.

On the day of the August election, 1883, at Neatsville, in Adair county, while Miller Brewster, a man about fifty years old, was there, attending as a voter, as we suppose, he was accosted by Champ Fitzpatrick, who said to Brewster that he had told a lie on him. Brewster replied that he had not, but if he had he would take it back. Fitzpatrick then said he had been talking about him in the neighborhood. Brewster responded that he had not, but if he had he would take it back, and did not want any trouble. Fitzpatrick then struck him in the mouth with his fist or hand, and knocked his hat off. Brewster had hold of his little boy by the hand, but let go of him about that time, and picked up his hat and put it on with both hands, and again said he did not want any trouble. Fitzpatrick then took hold of him and began striking him with a knife. He would try to get loose and get away, but Fitzpatrick would catch his hair, which was long and jerk him, and stop him until he had cut him a number of times, and he was very

bloody. At this juncture, the crowd having gathered up about them, excited, some saying part them and others exclaiming let them fight, Rude Fitzpatrick, a married man and the brother of Champ Fitzpatrick, rushed up, having run about one hundred yards, and shot Brewster just below the nipple, the ball passing through and lodging under the skin of his back. He sunk down and then Champ Fitzpatrick walked around and shot him in the head above the ear while he was resting with his elbow on the ground and his head on his hand. He then fell flat on the ground and quickly expired. He made no resistance whatever; he did not strike or offer to strike to save himself from that ignominious and bloody death.

The appellants, Champ and Rude Fitzpatrick, were indicted for the murder of Miller Brewster and upon their joint trial, the evidence disclosing the facts stated, and some others which will be noticed hereafter, they were found guilty, and their punishment fixed at death.

From a judgment upon the verdict sentencing them to be hanged on the 7th day of December, 1883, they have appealed, and their counsel insist that the court erred in excluding competent evidence from the jury; in failing to properly instruct them, and by overruling a motion for a new trial.

It is not pretended by counsel in argument that either of the appellants is insane, but it is insisted that the court erred in not allowing Samuel Bryant, a witness introduced by the Commonwealth, to answer, on cross-examination, this question: "Are the defendants strong or weak-minded?"

It was avowed that the witness was expected to answer that "both of defendants were weak-minded." The witness was allowed to state, and he did state, "he had known defendants all their lives. They have little or no education; have gone to school, but don't think they ever learned very much. Don't think they have power to control their actions when aroused." Whether this witness would have stated what was expected is not material in view of his subsequent explanation of the facts which were much more important than the opinion that defendants were weak-minded. This effort to get before the jury the opinion of another witness, W. F. Neat, that the defendants were weak-minded, was prevented by the ruling of the court.

But Neat testified that "he had taught school in the neighborhood where defendants were raised, and both of them have gone to school to me, and I could never learn either of them very much, if anything."

The attorney for the defendants put the question in this form: "State if or not defendants are of sound mind, or are they not weak-minded men." The court sustained an objection to it, evidently because the question embraced the last clause, and this is shown from the fact that the witness was allowed to state "that he did not think that the defendants, or either of them, had or have power or reason sufficient to control their actions when aroused. Perhaps they know right from wrong in some things and in others they would not, and when in a passion don't think they have sufficient reason or power to control their actions." There is no law which will excuse or palliate a deliberate murder on the ground that the perpetrator of it is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing the nature and quality of his act, or if he does know it, that he does not know it is wrong to commit it.

It is no excuse for murder that the perpetrator has not power to control his actions when aroused or in a passion. It is the duty of men who are not insane or idiotic to control their evil passions and violent tempers, or brutal instincts, and if they do not do so it is their own fault, and their moral and legal responsibility will not be destroyed or avoided by the existence of such passions or by their conduct resulting from them. There is no evidence in the record that would raise a doubt of the sanity of the appellants.

They were grown men; one of them married, the other (Champ) a farmer, who worked on or near the same place that Brewster worked on. He was passionate and threatened to tap Brewster over for so small a matter as a suggestion about fixing a broken plow, and some days before the election he said he would kill Brewster that day if he did not do it before. He had sense enough to do all these things and to go to the election armed, as both of them were, and, on the cunning and overbearing pretext that poor Brewster had lied on him or talked about him in the neighborhood, began the unresisted

and deadly assault upon him, which ended with the destruction of his life in the presence of his little boy.

It is true that it was proven that for twenty-five cents he swallowed a live young rat on one occasion, and a mouse at another, but this evidence, instead of showing irresponsible insanity, tended to establish the bad passions which were essential to the perpetration of such a deed. The most that can be inferred from the evidence above alluded to and quoted, which is all there is upon insanity or weakness of mind, is that the appellants were illiterate, ignorant and passionate men; and we think the court did right in excluding the evidence which was expected to be given in response to the questions as to the supposed weak minds of the appellants, and also in refusing to instruct the jury on the question of insanity, for there was no plea of that kind seriously relied on, and no appreciable evidence to support it. It is complained that the court refused to give any instruction on the question of self-defense. In this we think the court did right; likewise, because there is not a shadow of evidence, by any witness, for or against the appellants, that they, or either of them, were in the sightest danger of loss of life or bodily harm of any kind at the hands of Brewster, as the above recital of the facts conclusively demonstrates.

One witness testified that Brewster took a step towards Champ Fiztpatrick while the latter was assaulting him. If he did the evidence shows it was because Fitzpatrick would jerk him back by the hair of the head, as he struggled to get away from him, and certainly this portended no danger to the appellants, or either of them. Their brother testifies that Brewster told him on the morning of that fatal day "that if Champ was there he had better tell him to leave, or he might be carried away dead; and he told his brother of this interview before the fight."

Even if he did communicate such a threat that, of itself, as this court has held, if it were the threat of the most desperate and lawless man, furnishes no excuse for taking his life; and there is no evidence that any hostile demonstrations or wish had been made, or existed on the part of Brewster, before or at the time he was slain, towards the appellants, or either of

them, and it is a misnomer to call the unrelentless destruction of the life of Brewster a fight. It was not a fight. And the facts and circumstances did not authorize an instruction on the question of self-defense, and the court, as we think, did its duty in refusing to give such an instruction.

The court correctly instructed the jury on the question of murder, manslaughter and reasonable doubt; and as the real question in this case has been fairly tried, and the verdict of the jury is sustained by the evidence, we have no power or inclination to disturb it.

Wherefore, the judgment is affirmed.

Owen & Miller and Winfrey & Winfrey for appellants.

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## HINSON, &c. v. ENNIS.

(Filed November 1, 1883.)

**Contribution—Where a testator directed that his debts should be paid and then devised one-third of his land to his widow and the balance to his children, and the personalty proving insufficient, it became necessary to sell the land to pay the debts, it is Held—That if the widow accepted the devise, her share of the land must contribute to pay the debts as any other devisee's. And the fact that her share was defined by particular boundaries does not exempt it. As to the mode in which the land is to be subjected, it is to be divided and her share allotted, the proportion of the debts which she is to bear is then to be ascertained and her land sold to pay that proportion. The balance of the debts is then to be made out of the remainder of the land.**

Appeal from Allen Circuit Court.

Opinion of the court by Judge Pryor.

In this case the question arises between the widow and the children of the testator upon a petition filed to pay his debts. By the provision of the will the executor is directed to take charge of his estate and pay first all the debts of the testator.

He then devises to his wife one-third part of all the land owned by him at his death, to be laid off in a certain manner as provided by the will. By the fourth clause he devises the balance of his land to his daughter, etc. The personal estate being insufficient to pay his debts, it became necessary to sell enough of the land to pay the sum reported by the commissioner, amounting to about $2,600. The widow claimed that

the entire landed estate given to the daughter should be exhausted before the devise to her was subjected, but the chancellor held otherwise, and she appeals.

This court, in the case of Chambers and Wife v. Davis, 15 B. Monroe, 522, held that the widow in a case like this took as a devisee and derived no right as widow, although the devise may have the effect to bar her claim to dower. She had the right to renounce the provisions of the will, as provided by statute, but having accepted the provision made for her by the will she takes as any other devisee. There is nothing on the face of the will showing that it was in lieu of dower, and she can not, therefore, exonerate that portion of the estate devised to her from liability and place the entire burden on the daughter.

Suppose, instead of the widow, that the devise had been made to one of several children and the balance of the land to the remaining children, it would scarcely be argued that in such a case the devise to the particular child would be exempted from the payment of debts until the balance of the land was exhausted.

The widow occupies no better position than any other devisee, and the fact that the land devised to one of the devisees is defined by a particular boundary, is not such a devise as would make all the other devisees pay the debts before the one with the denfied boundary could be made liable.

The objection to the judgment in this case consists in the fact that the court has confined the appellant to one-third of the land left after the payment of debts.

She has a particular quantity or description of land given her by the will, and to this she is entitled, subject as between her and the other devisees to contribute her part of the indebtedness. The sale and amount of the contribution is to be determined by the value of the devise. If the sum with which the widow is to be charged is eight hundred or a thousand dollars, the land, the chancellor having allotted it to her, should be sold to pay it, and the balance to be made out of the remaining land if sufficient for that purpose. As between the devisee and creditors the entire estate can be subjected, but the chancellor should equalize the burden in a case like this by making the devisee contribute. The judgment for this

cause is reversed and cause remanded, with directions to have the land allotted as directed by the will and then subject each devisee's portion to the payment of what in equity she should contribute, to be regulated by the value of the devise.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Leslie & Botts and Lewis McQuown for appellants.

W. L. Porter for appellee.

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## SEIFRIED v. HAYS, &c.

Filed November 1, 1883.)

1. Nuisance—A owned a slaughter house which he had been working as such for twenty years when plaintiffs brought an action against him for a nuisance, and alleged that he left the entrails and other parts of slaughtered animals exposed on his premises, producing a foul stench, poisoning the air all around and endangering the health of plaintiffs. They asked an injunction. Held—That an indictment is the proper remedy for a common nuisance, and an individual is entitled to an injunction only when he shows special injury, yet the fact that the injury complained of was common to the five plaintiffs, does not make it a public nuisance.

2. Where the nuisance endangers the health of complainant or renders him uncomfortable, not from the annoyance caused by running the machinery, but from the pollution of the air, he is entitled to relief.

3. The fact that the nuisance was originally built remote from human habitations and plaintiffs have since put up their dwellings is no defense in an action seeking to enjoin the further continuance of the nuisance.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

Frank Seifried, the appellant, owns about eight acres of land near the boundary line of the city of Louisville and outside of the city limits, upon which he erected a slaughter house and for the period of near twenty years has been employed in slaughtering cattle and hogs on the premises.

In July, 1881, the appellees, Joseph Hays and others, instituted the present action, in which they allege that the appellant caused the intestines and other parts of animals slaughtered by him to be thrown in tanks, boxes, and in different places on his premises, and that the putrid and decayed flesh pro-

duced a foul and nauseous stench, such as poisoned the atmosphere for many feet in every direction from the premises of the appellant, embracing the dwellings of the appellees, thereby endangering the health of their families and destroying the comfort of their homes. They charge that unless restrained from this improper use of his slaughter house and materials the health of their families will be injuriously affected and the comfort of their homes impaired, and irreparable injury done them. A temporary injunction was issued against the appellant restraining him from continuing the nuisance, and upon the final hearing the appellant was enjoined and restrained from keeping dead animals, or any parts of dead animals, on his premises in such manner as shall cause the offensive odor and stench complained of.

The answer filed by the appellant contains two paragraphs. The first is a general denial of the complaint made by the appellees, and the second defense is in substance that the appellant has been engaged in the business of slaughtering stock for many years, and was so engaged prior to the time at which the appellees erected their buildings, or moved near to his slaughter house; that his business has always been conducted in a lawful way, and his establishment always clean and emitting no vile or foul odor; that the smell or stench connected with his business was no greater in 1881, the time of which appellees complain, than it had been during the entire period the appellees had lived near his premises, and that their acquiesence for many years in the manner in which he had conducted the business estops them from now molesting or interfering with the conduct of the establishment.

In determining the merits of this controversy the court will also dispose of the question raised by the demurrer to the petition, the appellant insisting that the nuisance alleged being a common or public nuisance, a private citizen can not maintain the action without an averment that he has sustained some special injury.

The doctrine is well settled that an indictment is the proper remedy for a common nuisance in the absence of any special or particular injury to the individual citizen, and, therefore, where a private person invokes the aid of the chancellor to restrain a public nuisance he must show some special injury in-

dependently of that affecting the public generally. (Barr v. Stephens, 1 Bibb, 292; Cosby v. Owensboro & Russellville Railroad Co., 10 Bush, 288; High on Injunctions, section 522.)

As many as five of the citizens living near the slaughter house of the appellant have united in the petition asking the same relief, and while this may be evidence of the existence of a nuisance affecting all alike, it by no means follows that each may not have sustained a special injury. If the facts constituting the alleged nuisance are established, private injury affecting the health and comfort of the families living adjacent to the slaughter house is the necessary consequence, and the fact that the injury is identical when applied to each family does not make it such a public nuisance as would deprive the citizen of his right to redress. If the nuisance is of such a character as to endanger the health of the party complaining, or that of his family, or such as renders his home uncomfortable, not by reason of the mere annoyance that the running of machinery or the ordinary conduct of the business in a legal way may cause, but where the injury is irreparable, such as the pollution of the air, both putrid carcasses or nauseous odors rendering his home or place of business unhealthy, or producing physical discomfort to the particular person, a court of equity will interfere to prevent the continuance of the nuisance and particularly in cases of this character.

"Slaughter houses are regarded as prima facie nuisances, and their existence so near to dwellings as to impair their comfortable enjoyment is an actionable injury" (Wood on the Law of Nuisances, section 504). The same author, in section 505, says: "That where originally built remote from the habitation of man or from public places, if they become actual nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads or the erection of the dwellings is no defense."

This court, in the case of Ashbrook v. Commonwealth, 1 Bush, 189, in reviewing the doctrine applicable to this class of nuisances, in commenting on the decisions in cases where the noxious trade had been established prior to the erection of the dwellings by the parties complaining of the nuisance, and

in which the party was allowed to continue his trade, because it was legal before the dwellings were constructed, said that those authorities did not affect cases involving the public rights and demands of cities and their populations, and cited the cases of The Commonwealth v. Upton, 6 Gray, 473, and Brady v. Weeks, 3 Barb., 157, where it was held in both cases that the carrying on of an offensive trade for years where there were no adjoining buildings did not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood.

The pursuit of a noxious trade, says this court, "is lawful so long as it does not interfere with the rights of the public, but where it does so interfere it becomes illegal," and while this applies to a prosecution by the State, the weight of authority leads to the conclusion that in the progress and growth of cities where dwellings have been erected near slaughter houses and by reason of the poisonous atmosphere emanating from such establishments the dwellings are rendered unfit for comfortable habitation, the owners have their remedy against the party whose mode of business creates the nuisance. (Greenleaf on Evidence, section 473; Dana v. Valentine, 5 Met., 8; Howell v. McCoy, 3 Rawle, 256.)

This court, in the case of Louisville Coffin Co. v. Warner, 78 Ky., 400, relied on by counsel for the appellant, held that where a nuisance caused substantial injury to the dwellings around it or affected the health of the residents the chancellor would interfere to abate it. That was an ordinary manufacturing establishment that could exist in the midst of a dense city population without affecting the inhabitants save as they were annoyed by the noise of the machinery and the inconvenience arising from smoke, etc., that settled near the dwellings, and that was afterwards prevented by the use of proper appliances, but here is a case where a party is charged with continuing a nuisance that must necessarily affect the health of the neighbors or necessitate the abandonment of their homes unless relief is given by the chancellor.

The question presented is, shall the right of these appellees to the enjoyment and benefit of their homes and families be held subordinate to the right of the appellant to continue a

nuisance because his slaughter house was erected before they purchased their homes? This question has been answered by the judgment below in the event the testimony sustained the complaint. There is an apparent conflict in some of the statements made by the witnesses, but nearly all concur in the fact that the atmosphere in the vicinity of this slaughter house was poisoned by this nauseous vapor during the spring and summer of 1881. There were other slaughter houses and distilleries in the same locality, but the origin of this foul odor can be, or at least has not been, traced to any of them with that unerring certainty that it has to the slaughter house of the appellant.

From that direction, and no other, seems to have come an odor that caused the closing of the doors and windows of the dwellings of these appellees during the evenings of the spring and summer of the year 1881, and in fact the doors and the windows of the church near by had to be closed for the same reason, and such was the character of the stench that it produced nausea, and must, if these appellees and their witnesses, twelve or fifteen in number, are to be believed, have rendered their homes almost uninhabitable.

That the poisonous odor existed can not be doubted, and the decided weight of the testimony is that it originated from the slaughter house of appellant. The boiling of the skins and bones of dead animals in the tank used by him in his establishment without using the proper disinfectants no doubt caused the trouble complained of. The testimony is perfectly satisfactory that such was the case, and in this conclusion the court below has been sustained by several witnesses who have testified for the appellant. That a peculiar odor is attached necessarily to such an establishment must be conceded, but when kept cleanly and the proper disinfectants used there could not well be such a condition of things as could poison the atmosphere for several hundred feet distant from the building.

The chancellor has not undertaken to stop the business of the appellant or to interfere in any other manner with the operations of his establishment than to prevent him from so using the slaughtered animals, or parts of them, as to create the offensive and poisonous odor of which appellees complained.

The judgment is, therefore, affirmed.

J. R. W. Smith and James Harlan for appellants.

Muir & Hayman for appellee.

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## STEPHENSON'S ADM'R v. KING, &c.

(Filed November 10, 1883.)

**Donatio causa mortis—Where a decedent owned certain choses in action which were not in her possession, but were held by her agent for her, and the only evidence of ownership that she had was a letter from the agent acknowledging that he held such choses for her, and she delivered the letter to her mother, intending the choses as a gift causa mortis, it is Held—That this delivery was sufficient to constitute a valid donatio causa mortis.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The intestate, M. L. Stephenson, was twice married. Her first husband was C. C. Storms, by whom she had one child, John Storms. She obtained a divorce from Storms in the year 1878, the father retaining the custody of his child, and afterwards married Stephenson, who is now dead.

Mrs. Stephenson died in July, 1881, and her first husband, the appellant, Storms, administered upon her estate, and this controversy is between him, as administrator, and the appellee, Mrs. Evans, the mother of Mrs. Stephenson, in reference to a mortgage note for $5,500 and two Taylor county bonds. Mrs. Evans claims the note and bonds under a gift causa mortis from her daughter, alleged to have been made the day prior to her death, and the appellant, Storms, claims them to pay debts, and then for his son John, the child of the intestate.

She owned also a house and lot in Lancaster about which there is no dispute, it passing by descent to her only child.

Mrs. Stephenson at one time lived in the city of Louisville, and after the death of her last husband moved to Lancaster, Ky., in which town the first husband, Storms, and her son born of the marriage resided. The mother was in bad health and it seemed to be her desire to locate near her son, where she could occasionally see him. Her residence was but a few hundred yards from that of her former husband, and the son in

going to his place of business passed by her house. She attempted to speak to him, but he seems not to have noticed her, and she remarked to a neighbor that he never looked towards her house or seemed to think it had doors or windows. When she was dying the ladies present sent a messenger to inform him of his mother's condition, and that it was his duty to come and see her. He told the girl to return and tell the ladies that he was otherwise engaged. The reasons causing this strange conduct on the part of the son are not developed by the facts of the record, except the suggestions of counsel that but few of her most charitable neighbors recognized her in social life on account of her character and surroundings, and what the son ought to have done under such circumstances is not for this court to say or make the subject of judicial inquiry in this case.

It becomes necessary to recite the facts connected with the conduct of the son toward the mother in determining the probability of the truth of statements made by a witness, whose character for veracity has been attacked, and upon whose statements the gift to the mother is sought to be sustained. The testimony would have to be of a more convincing character if the mother, who had been loved and respected by the son, without cause had made such a disposition of her property as divested him of all interest in it. Here the entire absence of all affection by the son for the mother may have caused her to select another as the object of her bounty, and such being the case before us, the fact of her giving the property to her mother is neither unreasonable nor unnatural. Her mother seemed to be her constant companion, nursing her during her entire illness, and with that natural instinct, however sad she may have been over her daughter's misfortunes, always ready to comfort her, and when death came followed her to the grave. The only question in this case is, has the gift causa mortis been established? The appellant's intestate, Mrs. Stephenson, when living in Louisville selected the appellee, John King, as her agent, placed her money in his hands for investment, and when she died King had the $5,500 note and the Taylor county $500 bonds in his possession, the bonds payable to bearer and the note endorsed in blank. The purpose on the part of Mrs. Stephenson to give this note and bonds

to her mother is established by undoubted testimony. Mrs. Marrs, Eliza Carson and Dr. Young all establish this fact, and there is no reason for discrediting any statement made by either of these witnesses. The principal witness establishing the gift is one Henson, a servant in the family, and if he is to be believed the defense is made out, and we think his testimony is strongly corroborated by those who are above suspicion. The gift was made to Mrs. Evans the day before her daughter died, by an actual delivery of the only evidence she had of King's having possession of the note and bonds. They were in the possession of King at Louisville, and no actual delivery of these evidences of debt could have been made. It seems she had written to King to know the condition of her business accounts, and he responds on the 13th of April, 1880, in which he says: "I now have in my safe one promissory note belonging to you on W. P. Hahn and Matilda Hahn, dated February 13, 1878, payable five years after date, for $5,500, with interest from maturity at 8 per cent. per annum," and also recites the $500 Taylor county bonds, and this letter is signed by King, and said to be genuine by him when examined as a witness.

Henson, the principal witness, says he was living at Mrs. Stephenson's when she died. She told her mother that she gave her property to her; "told her about a week before she died she give her everything; give her the key at the time and told her that everything that was there was her's. The day before she died she requested her mother to bring her her writing desk. She brought the writing desk up to her bedside; she opened the drawer and gets out a paper and gave it to her mother, and told her mother that this paper was to show the property she had at Louisville, and to get her money on the paper. Her mother took the paper and put it in her pocket. It was fine note paper written on both sides. She took the keys. It was the key of the desk Mrs. Stephenson handed her mother. Her mother unlocked the desk and pulled the drawer open and Mrs. Stephenson got the paper." This paper is identified by the witness as the letter from King in which a statement is made of the property in his possession belonging to Mrs. Stephenson. Dr. Young, the physician of Mrs. Ste-

phenson, a man of intelligence in and out of his profession, says that on the morning of the day of her death he said something to her about the disposition of her property. She said: "I want my mother to have it all after my debts are paid. I want my mother to have everything I have," and when told she was going to die, she said it is all for my mother Dr. Young says that after she made the remarks to him about her estate Mrs. Marrs came into the room, and he told Mrs. Stephenson that he wanted her to tell Mrs. Marrs about the disposition of her property. She said: "Doctor, that is all fixed; it is all my mother's," and repeated it several times. Mrs. Marrs testifies to the same fact, and there is no escape from the conclusion that the gift was made, if there was such a delivery as the law requires to constitute a gift causa mortis.

There is nothing in Dr. Young's testimony but what conduces to corroborate that of Henson. That the intestate stated to the Doctor, "I want mother to have it all; it is all for mother," is not inconsistent with Henson's statement, for it is evident that the intestate knew the estate would pass to her son unless she made some other disposition of it, and when the statement made to the doctor is considered in connection with that made by the intestate to Mrs. Marrs at the doctor's instance, it is a complete corroboration of the witness Henson. She responded to Mrs. Marrs by saying: "Doctor, that is all fixed; all mother's." She must have alluded to the gift made in the presence of Henson, that is, the delivery to her mother of the key of the small desk and the actual delivery of the letter from King, which was in fact a receipt evidencing the existience of the claims in controversy then in King's possession.

It is evident that there must have been either an actual, constructive or symbolical delivery of the notes in controversy to make it a gift causa mortis. It is insisted by counsel for the appellant that in order to make such a gift of a note or bond it must be delivered by passing manually from the possession of one to the other, and from this view of the question it follows that no delivery of the subject of the gift can be made when the donor is out of possession, or when he is unable, by reason of its being in the possession of his agent, to obtain the possession at the moment the gift is made. If this be the correct rule no gift causa mortis can be made of the thing, because it is not in the actual possession of the donor. Cases

have been cited sustaining the position assumed by counsel. (Spratley v. Wilson, note 1; 1 Williams on Executors, 658, note page; Case v. Dennison, 9 R. I., 88; Stevens v. Stevens, 2 Hun., 470.)

This rule we think has been greatly modified by the more modern decisions on the subject. It is true the delivery must be according to the nature of the thing, and usually this means according to the physical nature of the thing to be delivered, such as its bulk or weight, and does not refer to the locality of the thing. Under the ancient doctrine, if the thing was a chose in action, the law required an assignment or something equivalent in the form of a writing, and the transfer must be actually executed. This is the rule laid down by Kent in his Commentaries, volume 2. Now will it be insisted under the more modern authorities that an actual delivery of the chose in action to the donee will not constitute a gift? We think not. And when the donor delivers that which is the evidence of his right to property in the possession of his agent or his attorney, and when actual delivery of the thing itself is impossible at the time by reason of the possession being in another, we see no reason why there may not be such a delivery of the evidence of the right to the thing as is required to constitute a valid gift causa mortis. The possession of the agent is the possession of his principal. King was in Louisville with the note and bonds in his possession, holding them as the bailee or agent of the intestate. She delivers to her mother the receipt of King, or the letter she held, which is in effect a receipt, saying that it is a gift to her, and she must go and get the money. The delivery of a bill of lading or a warehouse receipt would have passed the right, but it is argued that in such a case that the writing is the representative of the thing itself; a symbolical delivery of the title and possession, while a note or the delivery of it can not pass in such a way. If the delivery of a debt or chose in action consists in the assignment with notice, as decided in a case from 2 N. H., —, referred to by counsel, his position is well taken, but such is not the law, nor do we perceive any reason for recognizing such a rule.

In the case of Stevens v. Stevens, supra, the dying wife said to her husband: "You may have all the money." It appeared

that the money she owned was represented by two notes, one of which was in the bureau in her husband's house and, therefore, accessible to him, and the other pledged to some one as collateral security. It was held that as to the note in the husband's house, which was in effect already in the donor's possession, the gift was good; but as to the note pledged as collateral security the gift was invalid. This case is also relied on by appellant's counsel. Suppose there had been in the bureau the receipt of an attorney for the collection of this note, and the wife, with the power to dispose of it, had handed to the mother the receipt of the attorney saying that she gave her the note. Why would not this have passed all the right to the mother? Suppose she had given her an order for the note, would not the gift have been vaild; and if so, why is not the delivery of the receipt or the written evidence of the donor's right to the note then in the possession of the attorney sufficient? A verbal statement that she gives the note is not sufficient, for there is nothing delivered representing or evidencing her right.

In the case of Turpin v. Thompson, 2 Met., 420, this court held that the more modern doctrine was that the beneficial interest in a note passed by delivery. There it is true the note was actually delivered but without an assignment, but it shows the modification of the former ruling on the subject. The older authorities maintained that a chose in action must pass by an assignment, and a delivery without it did not constitute a gift causa mortis, and this being the case no receipt or other writing evidencing the right to the note could operate as a transfer of the beneficial interest or promise so as to constitute a valid gift. In passing the receipt evidencing the right of property and the possession with the agent the donor parts with such dominion over the note as makes it valid. It is true the legal title is in the donor or her representative, and a payment by the agent or the debtor to the donor or her representative without notice would defeat a recovery by the donor, but such would be the case where there had been no assignment of the note or a payment without notice of the transfer.

This court, in Ashbrook v. Ryon's Adm'r, 2 Bush, 228, held that the delivery of the notes without assignment perfected the gift, but further held that the delivery of the pass book

did not give the right to the money in bank. Why it did not is not stated, but if equivalent to a certificate of deposit we see no reason why it should not have been a complete gift.

What evidence the pass book contained of the deposit in that case does not appear. If an ordinary pass book, and it must be so inferred, it was an acknowedgment by the bank that the donor had to his credit in the bank that much money, and when actually delivered we can not see why it did not pass the right. This court, in the case of Southerland v. Southerland's Adm'r, 5 Bush, 591, recognized as valid a gift causa mortis, when the husband, a few days before he died, called to his bedside Houston, who held the note, and said to him "that he wanted his wife to have the note." After this Houston assigned the note to the wife, saying that the intestate had given it to her.

There neither was nor could have been a delivery of the note at the time, as the record shows, yet the court held it a valid gift, and that the party holding the note, Houston, was from that time holding it as a trustee for the wife. In the case of Meriwether v. Morrison, 78 Ky., 572, the intestate endorsed on the note: "I transfer the note as a gift to Miss Agnes Morrison." A few weeks before the testator died he called the devisee to his bedside and told her he had given the notes to Dr. Meriwether for her. He told Dr. Meriwether to put them in the desk of the intestate, and after his death to give them to Miss Morrison. Witness did so, placed the notes in the desk in the room of the intestate and handed the key back to intestate, and saw them no more until after his death. The gift was held to be valid. In Ellis v. Secor, 31 Mich., 185, the facts are: "On a slate by the bedside of the intestate, who was found dead, was in her handwriting and signed, "I wish Dr. L. to take possession of all, both personal, real and mixed; I am so sick I believe I shall die—look in valise." In this valise was found a memorandum written by her, directing Dr. L. to take all of her property. The court said: "We think it clear that Rachel Hill did all that she could to create a gift causa mortis, and fully intended it; and that her mother's declaration should prevail as a valid appointment to the uses indicated as fully as if there had been a manual delivery of the

securities. In Hill v. Stevison, 63 Maine, 364, M. had deposited money in bank, handed his pass book to C., at the same time saying to him that she gave the money in that book to H. and I., and requested him to keep the book, and after his death to divide the money between them, it was held to be a valid gift of the money to H. and I. In Elam v. Keen, 4 Leigh., 333, Elisha Keen devised the whole of his estate to his mother, Elizabeth Keen, who was also his executrix. The devisee, Elizabeth, being entitled to a bond which had been executed to her testator, which bond was then in suit, told the plaintiff "that he might have the bond, and gave him the attorney's receipt for it." It was contended that there was no such delivery as rendered the gift valid, and this was the only issue. The court said: "There are many things of which actual, manual tradition can not be made, either from their nature or situation at the time. It is not the intention of the law to take from the owner the power of giving title, it merely requires that he shall do what, under the circumstances, will in reason be equivalent to an actual delivery." The gift was held valid. In the present case the intention to make the gift long before it was made is established by undoubted testimony. The motive for making it is equally as well established, and the delivery of the key of the desk, and the actual delivery of the letter from King, containing a full description of the notes and bonds held by the agent, the only evidence the intestate had of his possession for her use, is a sufficient delivery to make the gift complete. No other delivery could have been made, and the arbitrary rule, such as formerly existed with reference to the delivery of choses in action, requiring an assignment and delivery of the identical thing in order to make such a gift valid, having long since been abandoned, there is no reason why the intention to give, with the actual delivery of the written evidence of the right to the thing, although in the possession of another, under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift causa mortis. The chancellor below acted properly in giving to the mother of Mrs. Stephenson the note and bonds in controversy, subject to the rights of creditors.

Judgment affirmed.

Anderson & Herndon, Alexander P. Humphrey for appellant.

Jas. Harlan, A. E. Willson, Denny & Tomlinson for appellees.

# ALEXANDER, &c. v. De KERMEL, &c.

(Filed November 15, 1888.)

1. Reversions—Rule in Shelley's case—Although the rule in Shelley's case has been abolished in Kentucky by statute (General Statutes, chapter 63, article 1, section 10), yet the common law doctrine of reversions still prevails here, and where land is conveyed in trust for the grantor's use during life and to his issue, if any, in fee; if none, then to his brothers and their issue; and if both of them die without issue before the grantor, then the grantor's heirs; it is held that the last clause purporting to cast the reversion upon the heirs after the determination of the preceding estates is not effectual, as the law would have done that independently of the deed, and consequently the heirs take the estate not under the deed, but by inheritance or operation of law as the heirs of the grantor. But thus to take the reversion from him, independently of any deed or devise, allows the reversion to be his property, and he may dispose of it by devising it to anyone, though other than his heirs. It descends to them only in the event he fails to dispose of it. The rule in Shelley's case operates only on remainders and not on reversions.

2. Demurrer—Final order—Where the court in sustaining a demurrer to a petition merely enters an order to that effect without following it up with judgment, it is Held—That the order is not final and not appealable, no judgment having been entered. And the court afterwards concluding its action in sustaining the demurrer is erroneous, may disregard that order and render judgment in favor of the pleading demurred to. Even where a judgment is entered sustaining the demurrer to the petition that is no bar to a subsequent action unless the petition was in fact sufficient.

3. Deed—Delivery necessary—Where A made a deed to B, which was neither delivered to B nor accepted by him nor by anyone for him, the deed was not binding on A, although he had lodged it with the clerk for record. Lodging it for record is not equivalent to delivery unless the grantee directed it or assented to it.

4. Acknowledgment as evidence of delivery—Acknowledgment of the deed is a fact which may be proven to show delivery was made, but standing alone by itself it does not establish a presumption of delivery. And even where it has been both acknowledged and recorded and a presumption of delivery arises therefrom, this presumption is rebutted by grantee's denial of delivery.

5. Where suit was brought by the heirs of the grantor to recover the land, and the deed was then for the first time put to record and fully acknowledged, no presumption arises from such acknowledgment of due delivery of the deed to grantee or of acceptance by him.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

This was an action by appellees for the construction of a deed of trust made by Thomas Bullitt Alexander in 1856, and of his will made in 1878, while in the Republic of France, at the appellees' home, whither he had gone some time after the

American Civil War, and where he virtually enjoyed their hospitality and kindly offices for several years preceding his death.

By the deed of 1856 he conveyed a lot and warehouse thereon to Wilson in trust for his own use during life and to his issue, if any, in fee; if none, then in equal parts to two half-brothers or the survivor or to the issue of either, and "if both of them should die before the party of the first part without issue, said property shall go to the heirs of the said party of the first part."

The half-brothers died without issue before Thomas Bullitt Alexander, who after their death, himself having no issue, devised by his will the house and lot to the appellee, Mrs. De Kermel.

The petition of herself and husband was not paragraphed until after appellants made a motion to compel them to paragraph it, which they did without objection. Thereupon the appellants claiming the house and lot as heirs and devisees of Col. T. L. Alexander, who was the father of Thomas Bullitt Alexander, and survived him, demurred to the first paragraph of the petition, which was sustained, but no judgment was rendered effectuating the demurrer either by dismissing the first paragraph or otherwise. In this condition the case was transferred to the vice chancellor's court, and there, upon the hearing on the merits, the appellees recovered judgment declaring the title to be in Mrs. De Kermel, and removing the cloud therefrom. From that judgment this appeal was taken. The first question is whether the order sustaining the demurrer was final and conclusive unless reversed, the appellees having failed to appeal from that order. As there was no judgment following it, the mere order sustaining the demurrer was not final and appealable.

It is well settled that even a judgment on demurrer, unless the complaint is sufficient, is no bar to a future action. Section 267 of Freeman on Judgments has no application where the demurrer is not followed by a judgment or an order equivalent to a judgment. Although a demurrer may be sustained, the case may be kept in court for the purpose of amendment or reconsideration before judgment of dismission, and the court

may finally determine not to dismiss the pleadings on either of those grounds.

Hence the order sustaining the demurrer to the first paragraph of the petition is not final or preclusive, and the subsequent judgment of the court must be treated also as an order correcting the error in sustaining the demurrer, which the court had the right to make, as no former judgment had been rendered on the demurrer In the first paragraph of the petition the appellees set forth the deed of 1856 and the will, and in the second they averred substantially that if they were mistaken as to the proper construction of those instruments, then they were entitled to the property because of an agreement and declaration of trust on the part of the father of Thomas Bullitt Alexander to hold it for his use.

The appellants answered controverting the material allegations of the petition as to the construction of the deed and will, and in avoidance pleaded a conveyance of the house and lot in May, 1864, by Thomas Bullitt Alexander to his father, in consideration of $9,000, all of which is stated to have been paid in different amounts from the year 1854 to the date of the deed, except $1,000 paid at the latter date. The appellees in effect replied that this deed was never delivered to or accepted by his father, and if it had been it was in trust for Thomas Bullitt Alexander's use and benefit.

Thus it will be seen that the correctness of the judgment below depends upon the legal effect of the deed of 1856 and on the fact whether the deed of 1864 was delivered, and, if so, whether a maintainable, resulting trust grew out of the circumstances of its execution.

We will first consider the deed of 1856. The real question under it is whether the term "heirs" embraced in the words "said property shall go to the heirs of the said party of the first part," imports purchasers. It is undoubtedly the law that Thomas Bullitt Alexander had the right to designate his heirs as purchasers under the deed, but whether he intended to do so depends upon the terms which he employed. We must assume, in the absence of words in the deed expressing a contrary intention, that the language quoted from it was used in its legal sense, and subject to legal interpretation.

According to the elementary books the language under consideration made such a disposition of the reversion in the property, which was not absolutely conveyed by Thomas Bullitt Alexander, as the law would have made had not the reversion been provided for or nothing said about it.

According to Coke, "a reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate," and in illustration of reversions he says: "If a man seized of lands in fee make a foeffment in fee (and depart with his whole estate) and limit the use to his daughter for life, and after her decease to the use of his son in tail, and after to the use of the right heirs of the feoffor; in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himself, yet hath he a reversion," and he says further, even "if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion of the fee had been in him because the use of the fee continued ever in him." And as a reversion is never created by deed or writing, arising only from construction of law, it would seem that the last quotation precisely embraces such a case as this, and places the estate in the grantor as a reversion by the construction which the law gives to his deed.

On page 175, volume 2, Blackstone, in treating of reversions, uses these words: "An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him," and that "Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over." Blackstone attributes the doctrine of reversions to the feodal constitution, but Kent differs from him, and says that reversion in the general sense must be familiar to the laws of all nations who admitted of private property in lands (4 Kent, 389). Therefore, and from the nature and purpose of reversions, we think they are not as inimical to our allodial system of titles to lands as remainders on which the doctrines of English entails were principally based.

There is nothing like the mischief in saying by deed, after the termination for a life estate or the happening of an event destructive of a defeasible fee, that the estate shall go to the heirs of the grantor and that such heirs so designated shall not take as purchasers, as flowed from the rule in Shelley's case, undetermined by decision and overturned by statute, where a grant to one person for life and in remainder to his heirs conferred the whole estate upon him on whom, in many instances, the grantor intended only to cast a life estate. In such cases the heir was defeated of any present estate, though intended to be a purchaser, and the intention of the grantor subverted and the common sense of his words ignored. Happily for the State no such rule ever got a practical foothold here, and the legislative act by which titles ceased to be menaced by it is a strong fact in support of the continuation of the law of reversions which were left undisturbed at a time of discussion and investigation which necessarily called attention to them. This view is supported by statutory recognition of a remedy by action in behalf of the reversioner equally with the remainderman for waste by tenant for life or years (General Statutes, chapter 66, article 3); and by the provision for the sale of the rights of reversions, section 25, article 1, chapter 63, Ib. The language of the 10th section of article 1, chapter 63, General Statutes, was strictly appropriate for the repeal of the rule known as the rule in Shelley's case, and it was adapted alone for that purpose. And it appears to us that the manifest intention of the legislature not to interfere with reversions, coupled with the fact that they are essential to prevent the abeyance or lapsing of estates where the remainders all fail in the lifetime of the grantor, who can have no heirs while living, settles beyond controversy that the common law doctrine of reversions prevails in this State, as well as the great body of the rules relative to remainders.

By the rule in Shelley's case the grantor, while parting with his estate for one purpose, was compelled to stand by and see perhaps the more valuable part of it diverted to another contrary to his most express intention. That can not be so with reversions, for if the grantor may have meant that his heirs should take as purchasers, but did not use language sufficiently explicit for that purpose, which would make them remainder-

men instead of reversioners, the property reverting back to himself, or, more strictly speaking, the reversion becoming an estate in possession, he would be still in condition to have his estate take the course he first intended, but did not express; or as no livery is necessary under our laws, he could convey it by deed or devise to such as would be his heirs, and thus secure to them the property, if he so desired. This view has ample foundation in the 18th paragraph of Washburn on Real Estate, volume 2, chapter 8, where law relative to reversions is correctly stated in these words:

"At common law, if a man seized of an estate limited it to one for life, remainder to his right heirs, they would take, not as remaindermen, but as reversioners, and it would be moreover competent for him as being himself the reversioner, after making such a limitation, to grant away the reversion."

Neither is there any danger of entails under the law of reversion, for remainders are necessary to that end, and they can not be created so as to suspend the absolute power of alienation for a longer period than a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter (General Statutes, section 27, article 1, chapter 68). According to our view of the law, found in text-books and many decisions of great value, we are convinced that the language of the deed of 1856 created a reversion in Thomas Bullitt Alexander which is a devisable estate both at common law and by our statute on wills. (2 Washburn, 887.)

And unless the deed of 1864 presents a barrier to her right the appellee, Mrs. De Kermel, is entitled, as devisee of Thomas Bullitt Alexander, to the house and lot in controversy.

The first question is, was that deed ever delivered to Col. T. L. Alexander or accepted by him?

Thomas Bullitt Alexander, in May, 1864, being then a captain in the United States Army, came to Kentucky, resigned his commission, and at Owensboro executed the deed which was brought to Louisville by Charles P. Rudd and probably left by him with the clerk for record. There is no evidence that Col. T. L. Alexander ever saw the deed after its execution, and he was not present when his son signed it. Nor did he

delegate anyone as his agent to accept it for him so far as this record shows.

No one seems to have seen or thought of the deed until Mrs. De Kermel set up the claim by suit to the property under the will of Thomas Bullitt Alexander, then it was put to record. It had laid in the county clerk's office from June, 1865, to June, 1881, a period of sixteen years, without having been recorded with an entry, in the alphabetical list of unrecorded deeds, giving the grantor, grantee, date, brief description of the property and "not fully proven."

About one month before Col. Alexander's death he had no recollection of the deed. From the circumstances of his son, who was on his way South to join the Confederates, it is reasonable to infer that Col. Alexander, then an officer of the United States Army, did not have any part personally in the preparation or handling of the deed, or in selecting its depository. In fact he seems to have avoided doing so, leaving the matter as if he knew nothing of it, giving no one authority to accept the deed for him and never looking at or handling it himself. Had he known such a deed was executed, and had he in good faith entered into the transaction it purports to evidence, and parted with $1,000 in cash down, and previously paid $8,000 as a consideration for the property; he certainly would have caused the deed to be recorded if it had been delivered to him or he had accepted it. It is true he sent his son $500 just before the deed was signed, but that he never relied on it for title or in fact knew where it was or its condition is abundantly shown from written statements made by him in letters written to Mrs. De Kermel. In one dated July 19, 1880, he speaks of the sale of "his house in which he would have to join," meaning Thomas Bullitt Alexander. The latter, in a previous letter written in 1877, says: "I am perfectly willing to give my signature if his father would like to sell and invest in something else."

These facts, without mingling them with those which stamp the whole transaction as a trust sought rather to be imposed on Col. Alexander than voluntarily accepted by him, show that the deed was neither delivered to him nor accepted by him or by anyone else for him with authority to do so. The law is clear on this point that there must be a delivery and an actual

acceptance or assent before the deed becomes binding between the parties, or valid as a deed. The mere execution of the deed by Thomas Bullitt Alexander and the delivery of it to the county clerk is no delivery unless Col. Alexander so directed it, or afterwards assented to it (Maynard v. Maynard, 10 Mass., 456; Sampson v. Thornton, 3 Met., 275; Cooper v. Jackson, 4 Wis., 537). There is no proof that he did either. Counsel contend, however, that it is well settled in this State by the cases of McConnell v. Brown, Littell's Sel. Cases, 459, and Ford v. Gregory, 10 B. Monroe, 180, that the acknowledgment of a deed is prima facie evidence of previous delivery. In the first of these cases the court expressly says that an acknowledgment is merely evidence of the delivery, but it is not a delivery. Of course an acknowledgment is evidence competent to be considered on the question of delivery, but this is a very different proposition from that of counsel, who would give a degree of weight to that fact which it can not support. The only presumption arising in that case is that when delivery is established, it is presumed that the time of delivery is the date of the deed. To the same effect is the case of Ford v. Gregory, supra, in which it is said: "The delivery of a deed is always presumed to have been made on the day of its date, and its subsequent acknowledgment does not change this presumption, * * * and as the acknowledgment is only evidence of an antecedent delivery, and the date of the deed is only prima facie evidence of the time," other evidence of the time, etc., is admissible.

The acknowledgment is a fact which may be proven to show delivery, but standing alone it does not establish a presumption of delivery. And for many good reasons it ought not to do so. It only requires the act of the grantor to make the acknowledgment, and it would be dangerous policy to allow such weight to an act of his own as to make it prima facie evidence of the important fact of delivery, which requires the concurrence of the grantee.

In the case of January v. Bradford, 4 Bibb., 566, it was held that a person bound by bond to make deed could not, without the assent of the grantee, make him a deed by executing and acknowledging it before the clerk of the county court, and for the same reason we do not think a prima facie case of delivery

can be made by such acts. Even where the deed is acknowledged and recorded, the denial by the grantee of delivery repels the prima facie presumption of acceptance (Skillman v. Hamilton, &c., 1 Bush, 248). In such case the act of recording and the effect of the record itself are matters which are not wholly in the control of the grantor, and they are very important facts, for they are generally the result of the act of the grantee, and more importance should be attached to them for that reason, but his denial even as to them abates their prima facie force.

In this case the deed was not fully acknowledged or put to record until after the action was brought, and these are not such facts as to authorize a legal presumption of the delivery of the deed. The grantee must assent to the delivery, and according to the case of Bell v. Farmer's Bank, &c., 11 Bush, 39, the grantee must be informed of the deed and do some act equivalent to an acceptance of it, or he may refuse to accept it. Presumption of acceptance could not be indulged in this case even against the grantor were he living, except through a fiction of law that acceptance had been made by law operative for the grantee. But such a presumption should not be indulged against third persons who have acquired title to the property before the time of actual acceptance, 11 Bush, 39 and 40, supra. Here there was no actual acceptance before lis mota and really none until lis pendent. The rights of appellee, Mrs. De Kermel, had attached, and they can not be destroyed by an afterthought causing the record of this dormant deed made by a young man, pressed under unfortunate circumstances to take the liberty of trusting his property to his father by executing and placing the deed in the county clerk's office, where it lay sixteen years unrecorded, forgotten and disregarded, unless he remembered it as he penned at the close of his codicil the line: "I beg my father to fulfill these, my wishes."

Wherefore, the judgment is affirmed.

Bullitt & Harris for appellants.

Brown & Davie for appellees.

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## L. & N. R. R. CO. v. SIMMONS.

(Filed November 24, 1883.)

**Demurrer—Final order—Appeal—A mere order sustaining a demurrer is not a final order or a judgment, and is, therefore, not appealable.**

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Pryor.

An appeal to be considered by this court must be taken from a final order or judgment. In this case the appellant, who was defendant below, filed an answer and counterclaim, to which a demurrer was entered and sustained, and no further order made.

Neither the plaintiff nor the defendant obtained a judgment, and the record, as presented here, shows only the petition, answer and the order sustaining the demurrer, with the exceptions.

The appeal is, therefore, dismissed.

W. R. Thompson for appellant.

F. P. Strauss for appellee.

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## SPALDING v. PAINE'S ADM'R.

(Filed November 8, 1883.)

1. Recoverable instruments—Mortgage of stock—F borrowed a sum of money of S., and to secure him executed a mortgage on certain shares of the stock of a corporation. S. had the mortgage recorded in the proper county. F. subsequently sold the same stock to P., delivered the certificate to him and transferred the stock on the books of the company. Held—P. was entitled to the stock free of all claim by S. on account of the mortgage. Such a mortgage is not a recordable instrument within the provisions of General Statutes, chapter 24, and by recording it subsequent purchasers are not charged with notice.

2. Shares—Transfer of—A share is a right to a certain portion of the surplus profits of the corporation. And the transfer of the certificate of such share by endorsement and actual delivery passes to the transferee all right as against creditors and purchasers unless the charter prescribes some other mode of transfer.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

Fontaine, owning 180 shares of the capital stock in the Louisville Transfer Co., and being desirious of raising money upon it, obtained a loan from the appellant, Samuel Spalding, of $6,000, and in order to secure Spalding executed to him a mortgage on this 180 shares of stock and had it recorded in the clerk's office of the Jefferson County Court, the county in which the property of the corporation was and now is, and where its

chief office is located. After the execution of the mortgage and its record Fontaine sold this stock to E. H. Paine, delivering to him the certificate and having the stock transferred to him on the books of the company.

This was all done without the knowledge of Spalding, and when he ascertained the sale had been made this petition in equity was instituted, in which the insolvency of Fontaine is alleged, and that his (Spalding's) security will be lost unless the stock, or the right to the stock, is re-transferred to Fontaine on the books of the company; that Paine had constructive notice of his mortgage, and must hold it subordinate to his right as mortgagee. It is further alleged that the transfer was fraudulently made, and that Fontaine had disposed of the proceeds. A demurrer was entered by the appellee to the petition and sustained, and of this the appellant, Spalding, complains. It was argued upon the hearing "that Paine purchased the stock in controversy at its fair cash value and without actual notice of the mortgage to appellant."

No charge of actual notice to Spalding was made by the appellant, and in fact it is conceded that the only notice the latter had was such as the law gave by reason of the mortgage of record in the Jefferson County Court. The only question invoked in the case is: Was such a mortgage recoverable so as to effect creditors and purchasers, for if recordable the appellee had constructive notice of appellant's claims. Chapter 24, section 10 of General Statutes, provides: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deed shall be acknowledged or proved according to law, and lodged for record." Section 9 of the same chapter provides: "All deeds and mortgages and other instruments of writing, which are required by law to be recorded to be effectual against purchasers without notice or creditors, shall be recorded in the clerk's office of the court of the county in which the property conveyed, or the greater part thereof, shall be."

The Louisville Transfer Co. was incorporated by the legislature of the State, and the title to all the property is in the

name of the corporation, that is, the title is vested in the corporation and not in the individual stockholders.

A stockholder has no power to dispose of the property of the corporation, and if authorized by the act creating it to dispose of the property belonging to it, it must necessarily be in the name of the corporation. It is true the legislative grant will control the manner of disposing of the corporate estate as well as the stock of the individual members, and we find nothing in this case permitting the disposition of the property of the corporate body, or the stock of a member of the corporation, in any other manner than ordinarily pertains to this character of incorporation. It is not pretended that anything in the charter of the transfer company authorizes the stockholder to dispose of its property, and, therefore, the appellant acquired no title whatever to the corporate property by reason of his mortgage.

Did he acquire any right to the shares of stock as against the appellee? Shares, says Angell & Ames on Corporations, are merely evidences of property; the right to a portion of the surplus profits made by the corporation out of its capital stock (Sections 560, 567). The certificate represents the interest the stockholders may be entitled to in the dividends of the corporation, but the legal right to the entire capital stock is vested in the corporation. Justice Shaw, in the case of Hutchins v. State Bank, 12 Met., 421, said that a "share in a bank was in the nature of a chose in action." It is certain that such evidence of the right of a stockholder may be transferred by endorsement and the actual delivery by pledge or otherwise for money loaned would pass to the transferee the right, as against creditors and purchasers, in the absence of any provision in the charter prohibiting the transfer. In this particular there is but little, if any, difference of such evidence of right in the owner of stock and a chose in action, and while we must assume that the transfer to the appellee was made, as is usual in such cases, by a delivery of the certificates of stock to him and its transfer in his name on the books of the corporation, and in fact it is so admitted, we can not infer that the power was gievn the stockholder to mortgage the corporate property or his stock in the corporation to secure his debts. It is not insisted in this case, either by way of argument or in the pleadings, that any special provision in the act of incorporation au-

thorized the mortgage to be given upon the stock, while it is conceded that appellee holds the stock by transfer from the real owner in the manner provided by the charter. There was no delivery of the certificates of stock by Fontaine to appellant, but Fontaine retained his certificates, and afterwards sold and delivered them to the appellee, without notice of the mortgage, for a valuable consideration. Charters generally provide the manner in which stocks of corporations are to be transferred, but in this case we are not enlightened on the subject except from the answer made as to the manner in which appellee acquired title. Counsel for the appellant refers to the cases of Price v. Price's Heirs, 6 Dana, 107, and Copeland v. Copeland, 7 Bush, 349, and the elementary authorities as well as reported cases recognizing the doctrine that "in general any property which is capable of absolute sale may be mortgaged," as controlling the decision of this case. This court held in the cases cited that the perpetual right of way owned by railroad companies, with the wooden and iron fixtures, should be regarded as immovable, and, therefore, classified as real estate, and as the stockholders hold the beneficial interest the stock could be regarded in no other light than as real estate. We perceive no analogy between the cases and the one before us, except on the declaration that the corporation held as the trustee for the stockholder. By an act of the legislature subsequently passed, and approved March 22, 1871, it was declared that the capital stock of all railroad companies incorporated by the laws of the State shall hereafter be personal property, and while this enactment, if still in force, can not affect the question here, it was necessarily intended to obviate the trouble and inconvenience originating from the ruling of the court in those cases, and we perceive no reason for applying the doctrine in reference to property or the right of property in railroads to the stock of all corporations, nor do we adjudge that stock in railroad companies can be mortgaged so as to affect purchasers without notice, as such a question is not presented in this case. In the case of Field v. Montmolin, 5 Bush, 455, the issue presented was whether the stock of a debtor in a corporation could be attached or garnished for the payment of

his debts, and the court held that it could be done—nor was the word property with reference to the stock used in any other light.

As between the parties to the mortgage we have no doubt that it could be enforced, but the question involved here is: Can it be enforced against an innocent purchaser? In Arnold, &c. v. Ruggles, 1 Rhode Island, 165, the court said: "We decide that the shares are personal property, but of what kind? Call them personal chattels if you will, yet chattels personal are of two kinds, chattels in possession and chattels technically choses in action. Does the term share denote a thing in possession, or does it denote the mere right to a thing not in possession but in action? We have shown that a right to a note as a member of the corporation and a right to the dividend of the profits made are the beneficial interest that is called a share. But these rights subsist only in law or contract. All dividends save one must exist in the future; a chose not in possession; a thing subject to be demanded; money payable at a future day." (Denton v. Livingston, 9 Johns, 96; Union Bank of Tennessee v. The State, 9 Yerger, 490.)

This court has several times held that the mortgage of a chose in action is not within the statute requiring mortgages of real and personal property to be recorded. In the Bank of the U. S. v. Huth, 4 B. Monroe, 423, this court said: "Real and personal estate in possession may have a situs or local position, and may be located in a certain place or county, but a chose in action or a debt is not a corpus. It can not properly lie in any county, and the statutes are, therefore, inapplicable to such property or interest and can not be understood to apply to or embrace it (Vanmeter v. McFaddin, 8 B. Monroe, 485; Johnson v. City of Lexington, 14 B. Monroe, 648; City of Covington v. Powell, 2 Met., 226; Mueller v. Engeln, 12 Bush, 441). These certificates of stock are in the pockets of the owner, and go with him where he may happen to locate as choses in action, or evidence of his right without any means on the part of those with whom he proposes to deal on the faith of such a security of ascertaining whether or not this stock is in pledge or mortgaged to others. He finds the name of the owner on the books of the company as a subscriber of paid-up stock amounting to 180 shares, with the certificates in

his possession; pays for these certificates their full value, and has the transfer to him made on the books of the company, thereby obtaining a perfect title. What other inquiry is he to make so as to make his investment certain and secure? Where is he to look in order to ascertain whether or not this stock has been mortgaged? The chief office of the company may be at one place to-day and at another to-morrow. The owner may have no fixed or permanent abode, and with his notes in one pocket and certificates of stock in the other, and the one evidencing the extent of his interest in the stock of the corporation, the other his right to money owing him by his debtor, we are asked to say that the mortgage is effectual as to the one and inoperative as to the other. This is not a contest between equities. The legal right and the equity is with the appellee, and we can not well see how a purchaser for value, who has the evidences of title by a proper transfer, is to be disturbed in his right. Under the general law of the State authorizing the formation of corporations it is expressly provided that "transfers of stock shall not be valid except as between the parties, until the same are regularly entered on the books of the company so as to show the name of the person by whom the transfer is made. We infer, however, that this corporate company was not organized under the general law, and will also assume that the mode of transfer as is usual in like corporations—by a transfer on the books of the company. It is argued that the mortgage is not void as to the purchaser, although possession did not accompany its execution and delivery. We can only answer the suggestion by saying that the instrument is not a recordable instrument, and the purchaser parting with his money in good faith and obtaining the possession and title must hold as against the appellant. We know of no case in this State where a mortgage of such stocks has been held to invest the mortgagee with an equity as against a subsequent purchaser without notice. What may be the course of descent or the mode of distribution when the stock held is in a corporation, where the corporate property is regarded as realty, is also a question not before us, and our attention has been called alone, as there is no other issue, to the effect of the mortgage made by Fontaine to the appellant, and whether the stock is in the nature of a chose in action, or

evidences the extent of the interest of the stockholder in the corporation is immaterial, the title to all the corporate property is in the corporation, and that which is not tangible and follows the owner as a chose in action must be held as not within the statute authorizing the recording of written instruments conveying a legal or equitable title to real or personal estate. We find no precedent in this State sustaining the views presented by the appellant, and, as suggested by counsel for the appellee, much of the business of the country is conducted on the faith of the pledge of such stock as collaterals, and to adjudge that the holder of the stock by transfer on the books of the corporation or by endorsement and delivery by the owner is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers.

Judgment affirmed.

Barnett, Noble & Barnett for appellant.

W. O. & J. L. Dodd for appellee.

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## LOUISVILLE & NASHVILLE RAILROAD CO. v. McCOY.

(Filed November 6, 1883.)

1. Particularity in grounds for new trial—Under Civil Code, section 340, specifying the grounds upon which a new trial may be granted, some are stated with such particularity that the language may be followed literally in any case, others, if adopted in verbis, would not enable the court to know with any certainty what error was complained of. Of this kind is that embraced in subsection 8, error of law occurring at the trial and excepted to by appellant, hence, when this is the ground the particular error must be pointed out with such certainty that a person of good understanding may know what is meant. It is proper to designate each question not allowed to be answered upon the examination, and each instruction refused, especially if there are several issues involving different matters, but where all the questions and instructions related to the one subject of negligence, its degrees and by whom committed, it is sufficient to set out that "the court erred in law in refusing to submit to the jury the questions propounded," and that "the court erred in its instructions to the jury."

2. Ordinary care—Appellee brought this action against appellant to recover damages for injuries inflicted upon him by the gross and willful negligence of appellant's agents, while he, as brakeman, was engaged in coupling cars under their orders. In considering the question of care and negligence the court holds that ordinary care is such as is commonly exercised by persons of ordinarily prudent habits when placed under like cir-

cumstances. But this is only a general definition as the extent to which one is under another's control, and the danger to which he is exposed must affect the degree of care in each case, and this definition, therefore, does not exhibit the ordinary care which is required of a railroad in the treatment of its brakemen. Ordinary care by them is that which a majority of men of prudent and careful habits would exercise to avoid injury to their own persons were they exposed to the same risks which brakemen undergo. But a railroad is not bound to take that higher degree of care which a prudent and careful man would take of his family if placed in a like situation to the brakeman, and an instruction to that effect is here erroneous.

3. Gross negligence—In the management of a railroad gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under like circumstances. But to make out gross negligence it is not necessary to show such a degree as indicates intentional wrong to others or such a reckless disregard of their security as bad faith. And so far as Louisville & Nashville R. R. Co. v. Robinson, 4 Bush, 507, is contra to this proposition, it is overruled.

4. Willful negligence defined—Where one is guilty of willful negligence, he is not in general excused from liability by the contributory negligence of the injured party.

5. Damages—The injured party is entitled to exemplary, punitive or vindictive damages only where the defendant has been guilty of gross negligence.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hargis.

In the beginning collision of counsel renders it necessary to determine what questions are, by the grounds for new trial and assignment of errors, presented to the court for its decision.

According to section 340, Civil Code, there are eight general causes for granting a new trial, some of these causes are stated in that section with sufficient particularity to be followed specifically in the written grounds which may be filed by a party, but others are so generic that the language of the Code, if literally pursued, would not enable the court to know with reasonable certainty what particular error was complained of. This is specially the case with the eighth subsection, which was intended "to cover all errors to which exceptions might be taken, not embraced by some one of the preceding seven subsections." (McLain v. Dibble & Co., 13 Bush, 297.)

That case holds correctly that the language of the eighth subsection, which authorizes a new trial for "error of law occurring at the trial and excepted to by the party making the application," was the generalization of the lawmakers and not

sufficiently specific to point out the particular error which might be intended by the written grounds. That subdivision makes every error of law, which may be committed and properly excepted to during the trial, a cause for a new trial. Hence when the cause for new trial is embraced by it the particular ground of cause must be named in the written grounds with such a degree of certainty that a person of good understanding may know what is meant. Among other grounds for a new trial the appellant relied upon the following:

5th. The court erred in law in refusing to submit to the jury the questions propounded by defendant's counsel.

7th. The court erred in the instructions to the jury.

These grounds are embraced by the eighth subdivision of section 340 of the Code, and, as we think, are sufficiently specific to indicate the errors of which the appellant complains. There were only three questions which appellant asked to be propounded, and only two instructions which were given by the court to the jury. The questions and instructions all relate to negligence, its degrees, character, and by whom committed, and it seems should be considered together in order to understand the meaning of the court below. If more particularity were required in stating grounds for new trial than the appellant has used the courts must finally become entangled in the uncertainty which generally belongs to human expression, and as each case is presented to different judges, whose minds differ in the understanding of the force or meaning of language, the rule regarding the sufficiency of grounds for new trial that will be found to vary as much as their mental exceptions. This vague and misleading state of the rule which should be uniform and certain, as far as the subject will admit, was never contemplated by the lawmakers. The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial, and to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court with reasonable and ordinary certainty the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand

what errors are meant and to reconsider the facts or law out of which they are alleged to have grown. Unreasonable particularity or technical accuracy in the description of the errors is not required or practicable either in the grounds for new trial or the assignment of errors.

To describe each error with every particularity belonging to it would swell the grounds for new trial and the settlement of errors beyond their necessary or proper compass.

The law does not mean that the grounds for new trial shall contain a particular description of the errors relied on. but that the particular errors shall be simply pointed out or indicated in a common sense way.

Often, and most generally, a few well chosen substantives or strong words, referring to the subject and the action of the court thereon, will point out or name the error or errors as well as the most lengthy description. The court could hardly fail to know what errors the appellant relied on by the grounds for new trial above quoted.

There is no objection to pointing out or designating each instruction and each question conceived to be erroneously given or refused, and this is certainly a safe course to pursue, but where the questions or instructions relate to the same general question and its various phases, it is nearly always important to take a view of the whole in order to understand the defects or omissions of anyone of them, and a ground for new trial referring to them in the plural number is sufficiently specific. Where there are several issues and various questions of a different nature, then it may be a general reference to the instructions or questions would not be specific enough to guide the mind of the court to the supposed error. In such instances sharp practice or an effort to embrace some error by an indefinite or too general ground, without descending to particulars, could be discovered with but little trouble, and cut off by the application of the rule in the sense we have attempted to explain it above.

The assignment of errors, however, comprehends several alleged errors which were not alluded to in the grounds for new trial, and they will not, therefore, be considered.

But those quoted and some other grounds which it will be necessary to mention in this opinion are specified with ordinary and sufficient particularity, and will be examined.

This was an action brought by the appellee to recover damages of the appellant for personal injuries inflicted upon him by the alleged gross and willful neglect of its agents while he, as brakeman, was engaged, under their superior orders, in coupling the appellant's cars. The evidence bearing upon negligence and the extent of the injury was conflicting and of such a nature as required the court to instruct the jury upon the degrees of ordinary, gross and willful neglect, and in the law of contributory negligence.

There were but two instructions given to the jury, and they were confined to the definition of ordinary and gross neglect. As to other questions the jury were directed to answer certain interrogatories, and in response to one of these they fixed the appellee's compensatory damages at $7,598.50. The instructions are in this language:

1st. The court instructs the jury that ordinary care is that degree of care which an ordinarily careful and prudent man usually exercises under like or similar circumstances in taking care of himself, his family or his property, or in the transaction of his business when the same may endanger the safety of others.

2d. The court instructs the jury that gross negligence is that degree of negligence which indicates intentional wrong to others, or such a reckless disregard of their security or rights as to imply bad faith.

These instructions are both erroneous. Ordinary care, in its general sense, is such care as is commonly exercised by the majority of the community or by persons of ordinarily prudent habits placed under similar circumstances. But as the nature of the subject of the required care, whether animate or inanimate, capable of a high, low or ordinary degree of self-preservation, or merely under the control of the person charged with the care, and the danger to which it is exposed, are the main considerations in determining ordinary or any other degree of care in a given case, it is clear that what would be ordinary care in one kind of business would be gross negligence

in another. The law has a peculiar regard for human life, and as the business of conducting a railroad subjects it to extraordinary hazard, the general definition of ordinary care does not exhibit that care which the duty of those conducting railroads requires them to observe in its ordinary management. Ordinary care by them is that degree of care which a majority of men of prudent and careful habits would exercise under the same or like circumstances to avoid injury to their own persons from the same risks which others undergo in their service or in obedience to their orders, or by reason of the conduct of their hazardous business. But it is going quite too far to require that degree of care which any of such persons would take of "his family," placed in like or similar circumstances.

For it is against the laws of nature to expect a man of the greatest prudence to take the same care of an adult engaged in the dangerous employment of brakeman, which he has voluntarily taken upon himself and agreed to perform with that degree of care upon his own part which ordinarily prudent persons of his class usually take in protecting themselves from danger, as he would of his own family placed in a like predicament. For what would not a husband and father hazard to protect his own family from the ordinary dangers to which a brakeman is exposed. Imagine his horror, himself controlling every movement of the train, was he to see any member of his family engaged in the dangerous and difficult office of coupling the cars. It was not a fair test. It was calculated to transport the jury into sentimental regions in search of the exalted degree of care which ordinary prudence dictates under such circumstances, and opened a wide realm in which the skillful advocate could "fling the reigns to fancy." It is well that ordinary care, in such cases, should demand the same care that prudent persons take to avoid injury to themselves. But it ought not to be extended to their families, for no prudent man would place his family in every situation into which it might be his or the duty of others to go, although the duty might be attended with more or less danger, or even performed with safety. If railroad managers or agents take the same care of others that prudent and careful men usually take of

their own persons in like peril or under similar circumstances, they should be considered as having taken ordinary care.

Neither intentional wrong nor the implication of bad faith necessarily belongs to the definition of gross neglect. A person may be guilty of gross neglect without intending to do wrong to others or to act in bad faith in the performance of a legal or social duty. Gross negligence is not equivalent to fraud or malice, while it may "furnish evidence of fraud" or tend to show malice (Tudor v. Lewis, &c., 8 Met., 885). And in order to make out gross neglect it is not necessary to show that it is of such a degree as indicates intentional wrong to others or such a reckless disregard of their security or rights as to imply bad faith. The definition given in instruction No. 2 accords with the Roman civil law and with the definition of gross neglect found in Louisville & Nashville Railroad Co. v. Robinson, 4 Bush, 507; but it is not sustained by other cases decided by this court, and it is contrary to the common law (Sherman & Redfield on Negligence, sections 8 and 37; Hansford v. Payne, 11 Bush, 382; 10 Bush, 679.) So much of the case of L. & N. R. Co. v. Robinson as holds that "gross neglect is either an intentional wrong or such a reckless disregard of security and right as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the magna culpa of the civil law which, in some respects, is quasi criminal," is overruled because it confuses elements of willful neglect and substitutes them for those of gross neglect. There is some difficulty in laying down a definition of gross neglect which will include every state of facts on which the charge may be sustained and exclude every other that can not authorize the deduction. Sherman & Redfield, section 18, say: "Gross negligence is the want of even slight care and diligence." This court, in Maysville & Lex. R. R. Co. v. Herrick, 18 Bush, 122, said that "punitive damages were recoverable if the proof showed that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the prosecution of the same or of business of like character;" that "the absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence," and that it was not necessary to show the absence of all care, reckless indifference or

intentional misconduct to make out gross neglect. These alleged definitions of gross neglect are rather the statement of instances showing gross neglect than a definition embracing every state of facts constituting such neglect. It is certainly true in the management of a railroad that the absence either of all care, of the lowest degree of care or of slight care, is gross neglect, but it does not follow that the presence or exercise of slight care in the general sense and ordinary application thereof in matters of little or no peril to life negatives the existence of gross neglect charged in the management of a railroad, where human life is constantly in more or less danger.

Slight care in cases of this character should be of a higher grade or greater care than is required in an ordinary or less hazardous business. And while we agree with the doctrine in the M. & L. R. R. Co. v. Herrick, that if the proof showed the company failed to use such diligence as careless and inattentive persons usually exercise in business of like character punitive damages were recoverable, still we do not think the standard of the test in that case is strict or broad enough for any case possible to arise. We think, in view of the nature and hazard of the business of raliroad management, that slight care in such business is more than careless and inattentive persons usually exercise in like business. Whatever may be the scope of those terms they are not explicit in their comprehension and may mislead if adopted as a standard in ascertaining the existence or nonexistence of slight care, and consequently the presence or absence of gross neglect for which punitive damages may be given where death does not ensue. In the management of a railroad, or any department thereof, gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation.

There is an allegation of willful as well as gross neglect in appellee's petition, and as the appellant complains that the law of contributory negligence was not correctly expounded to the jury, it becomes necessary to define willful neglect. According to the cases of City of Lexington v. Lewis' Adm'x, 10

Bush, 677; Jacobs' Adm'r v. L. & N. R. R. Co., ibid, 263; Louisville & Portland Canal Co. v. Murphy, Adm'r, &c., 9 Bush, 522; Board Int. Imp. Co. v. Scearce, 2 Duvall, 576, and Claxton's Adm'r v. Lex. & B. S. R. R. Co., 13 Bush, 636, willful neglect in the statutory sense implies actual malice or antisocial recklessness, and may be equivalent to fraud. In general willful neglect is the intentional failure to perform a known or manifest duty in which the public has an interest, or which is important to the person injured, either in preventing or avoiding the injury to him. Where this high grade of negligence may be proven against a party he must answer in damages, notwithstanding the contributory fault of the person injured by it. This was the rule enunciated in substance in the cases found in Louisville, Cin. & Lex. R. R. Co. v. Mahoney's Adm'x, 7 Bush, 235; Digby, &c. v. Kenton Iron Co., 8 Bush, 166. It is the general rule, while there are exceptions to it which may often arise. For instance, where the person injured, knowing of the neglect of the party charged, voluntarily, with the intention of causing his own injury, placed himself where the injury could not be avoided either before or after the discovery of his condition. In such case no recovery should be had. But where the neglect is willful, the injury wanton, malicious or immediately intentional, contributory negligence of the person injured should not excuse unless of some such peculiar character as indicated in the exception noted above.

Whether the contributory neglect be active or passive it will not vary the rule if the action of the person injured results from an honest effort on his part to perform some duty connected with his station, or thought to be so by some superior, who directs him to discharge that duty. And in no case will the willful neglect of a party be excused by the contributory negligence of the person injured unless the contributory fault is more than gross neglect, and amounts to a purposed injury which could not be avoided by the exercise of a proper degree of care before or after its discovery. This rule seems to be absolutely necessary to the protection of human life, and it should be recognized wherever the proof will authorize it, whether the action is based upon willful neglect or not. Sherman & Redfield, section 37, say: "Where the defendant has

willfully committed an injury the rule" of contributory negligence does not apply.

In the case of The Tonawanda Railroad Co. v. Munger, 5 Denio, 267, it is said: "Injuries inflicted by design are not thus excused. A wrongdoer is not necessarily an outlaw, and may justly complain of wanton or malicious mischief."

And we think, as held in that case, where an injury is effected or results from an act which is either criminal or calculated to endanger human life, and it is the result of willful neglect of a party, he should not be excused by the contributory negligence of the person injured unless under circumstances similar to those indicated (Sandford, Adm'r, &c. v. Eighth Ave. R. R. 23 N. Y., 343). But where the proof shows gross or a less degree of neglect the law of contributory negligence should be given to the jury, if there be any evidence on which to base it.

Question No. 2 asked by appellant was too broad. It is not necessary, in order to render appellant responsible, to be shown that it could not, after discovering appellee's condition, have avoided the injury by proper care.

For it may be that appellant's own negligence rendered it impossible for it or its agents to discover any fault of appellee before he was injured, or to take any care whatever to protect him from his own negligence, or that the appellant's agent took no care to keep advised of appellee's act or to become aware of any negligence he may have been guilty of.

We do not understand the law to be that the party charged with gross neglect is relieved from responsibility in every case by the contributory negligence of the injured party unless he had actual notice of the injured party's fault in time to protect him. If the appellee, by his own negligence, contributed to such an extent to produce the injury to himself that but for his negligence it would not have happened, then he has no cause of action unless the appellant's agent, in managing and coupling the train, knew, or could have known by ordinary attention, of the peril in which appellee's negligence had placed him, and failed to observe reasonable care to avoid the injury which followed. (Sherman & Redfield, sections 24, 25; Paducah & Mem. R. R. Co. v. Hoehl, 12 Bush, 41, and cases there cited.)

The evidence in this case, which we have refrained from reciting because a new trial must be ordered, was such as to au-

thorize the court to instruct the jury on the law of contributory negligence as above defined. As to the question of excessive damages raised by appellants, it might be imprudent to discuss it in the light of the evidence, and in contemplation of a new trial. It is proper, however, to decide that exemplary, vindictive or punitive damages may be given where a personal injury has been caused by gross negligence, but nothing less in the management of railroad trains. (Maysville & Lexington R. R. Co. v. Herrick, 13 Bush, 122; Kentucky Central R. R. Co. v. Dills, 4 Bush, 593.)

As the evidence may present a different state of case at another trial we will not consider this point further, or go into the question as to how much or when compensatory damages are proper. We have considered questions in this opinion on which alone we should not have based a reversal, but as the record involved them and the whole law of the case should be understood as to both sides, we have ventured upon their consideration.

Wherefore, for the errors indicated to appellant's prejudice the judgment is reversed and cause remanded, with directions to grant a new trial.

Lyttleton Cooke, Wm. Lindsay and Isaac Caldwell for appellant.

Kinney & Kinney, J. T. O'Neal, James Harlan and A. E. Willson for appellee.

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## KENTUCKY SUPERIOR COURT.

## PEARCE v. COMMONWEALTH.

(Filed November 14, 1883.)

1. Autrefois convict—While the indictment in this case was still pending against defendant he was being prosecuted on another indictment in the same court for the same offense; in the latter case a verdict of guilty was rendered and judgment entered thereon after the trial in this case had commenced, thereupon he asked leave to file in this case a plea of autrefois convict, but was refused. It is held that he was entitled to file the plea.

2. Sufficiency of indictment—An indictment which charges defendant with merely keeping a tippling house at a certain date, without further setting out the facts constituting the offense, is sufficient under rulings of the Court of Appeals.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Richards.

The appellant was indicted for "the offense of keeping a tippling house, committed in manner and form as follows, viz.: "The said L. L. Pearce did, on the 4th day of May, 1882, in the county aforesaid, unlawfully keep a tippling house, contrary to the form of the statute," etc.

It is insisted that the demurrer to this indictment should have been sustained because the pleader disregarded that provision of the Code which required him to state "the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to show what is intended." (Criminal Code, section 182.)

It is true that this provision is mandatory and that the courts have required a compliance therewith in the prosecution of all offenses except that of keeping a tippling house. For instance, they have said that the acts constituting the offense must be alleged in an indictment for suffering gaming upon one's premises (Commonwealth v. Pereigo, 3 Met., 5); for passing altered bank money (Mount v. Commonwealth, 1 Duv., 90); for murder (White v. Commonwealth, 9 Bush, 178); for bigamy (Davis v. Commonwealth, 13 Bush, 318); for forgery (Stowers v. Commonwealth, 12 Bush, 342; Commonwealth v. Williams, 13 Bush, 267); for selling liquors without license, the defendant being a merchant (Wilson v. Commonwealth, 14 Bush, 159); and many other cases of similar import might be cited.

It is forcibly argued that prosecutions for keeping a tippling house should not be made an exception to this general rule; but nevertheless the Court of Appeals, in two published opinions, have held indictments good which in substance simply charged the defendant with the offense of keeping a tippling house, committed by keeping a tippling house. The first (Commonwealth v. Campbell, 5 Bush, 311) does not set out the indictment, but upon an examination of the record we find that it contained no allegation of the acts constituting the offense.

It is true there was no brief filed for the appellee, and there is nothing in the record to indicate that the attention of the court was especially called to the requirements of the Code; and, to the contrary, it would seem that the court was considering the offense charged and not the acts constituting it, for the only case referred to, The Commonwealth v. Harvey, 16 B.

Monroe, 1, discusses the general charge alone, and was decided June, 1853, before the Criminal Code was adopted, although not reported until 16 B. Monroe.

We do not consider it necessary to notice the argument that Commonwealth v. Campbell, supra, was not well considered, in that it says the allegation of time was superfluous in a prosecution for keeping a tippling house for three months, where the statute made keeping such a house for three months a separate offense, thereby constituting time a material ingredient, for we can not overlook the fact that the question of the sufficiency of the indictment was directly involved in the decision.

And in the subsequent case of Commonwealth v. Riley, 14 Bush, 44, the question was not only presented but considered by the court. "There can be no question," say the court, "but that by the provisions of the Criminal Code, and especially section 122 thereof, the acts constituting the offense of the accused must be stated in ordinary and concise language. And this provision applies to every indictable offense. And, therefore, if the question presented by this appeal was a new one, we should be inclined to decide that the indictment is insufficient, and that the demurrer was properly sustained."

The authorities which constrained them to hold contrary to what they considered the plain requirements of the Code were then cited.

We concede that the decisions thus relied on were all rendered prior to the Old Code, which first contained the provision they were interpreting, and that they related to the offense charged and not the acts constituting it, and that they were all based upon Morrison v. Commonwealth, 7 Dana, 218, in which the allegations of the acts constituting the offense were sufficiently definite to have been good under the Code, but nevertheless in Commonwealth v. Riley, supra, the court intended to decide, and did decide, that these requirements of the Code need not be observed in prosecutions for keeping a tippling house, and we can not disregard this authoritative expression from the court of highest resort, although the contrary view is ably presented by the counsel for appellant.

The prosecuting attorneys throughout the State have acted upon the supposition that this exposition of the statute would

continue to be sustained by the courts, and any change, without further legislation, would result in the dismissal of many prosecutions that the public interests require should proceed. The demurrer was, therefore, properly sustained. The cases relied on by appellant are not inconsistent with these views. In Herine v. Commonwealth, 18 Bush, 295, the indictment neither alleged the acts constituting the offense nor that the defendant kept a tippling house. In fact it seems to have been a prosecution under the statute against merchants selling liquors without a license; and the same may be said of Wilson v. Commonwealth, 14 Bush, 169. Fitch v. Commonwealth, 4 Ky. Law Rep., 339, was a prosecution under the local option law, and the indictment did not charge the defendant with keeping a tippling house.

It is claimed that during the pendency of this indictment the appellant was being prosecuted in the same court for the same offense. After all the testimony had been heard in this case the jury returned a verdict of guilty in the other, and a judgment was entered thereon. The defendant then moved the court to permit him to file a plea of autrefois convict, which was refused. The Code permits but three pleas to an indictment: First, a plea of guilty; second, a plea of not guilty, and third, a former conviction or acquittal (Section 172). When the appellant was arraigned there had been no conviction under the first indictment, and, therefore, he could not then have truthfully pleaded former conviction, and under the Code the mere pendency of the other prosecution was no defense to this. To refuse him the privilege of entering the plea so soon as the first prosecution terminated would be to make it impossible for him to prevent being twice convicted for the same offense—an injustice which is neither required by statute nor will be countenanced by this court.

The former opinion herein is withdrawn, the judgment still to stand reversed and the cause remanded, with direction to grant appellant a new trial and permit him to file his plea of former conviction. As to the effect of the plea in this particular case we can not anticipate. The petition for a rehearing is overruled.

C. W. Lester for appellant.

P. W. Hardin for appellee.

## DEFENSES TO NEGOTIABLE PAPER.

A well-recognized rule of law declares that a purchaser can set up no better title to the property purchased than his vendor had. An exception to this rule is made in the interest of commerce, and money is allowed to pass absolutely by delivery, thus A, who finds, or even has stolen, a bank note, can transfer it to B so that he shall hold it against its former rightful owner, supposing always that B is ignorant of his vendor's want of title and he pays value for it. And this exception is still further extended so as to embrace negotiable paper which passes as currency and performs the office of money, so that A may pass a bill of exchange or note, to which he has no right, to B, who may recover on it against the original owner, but the paper must have been taken before its maturity, and (as in the case of the bank note) B must have been innocent of any wrong and have paid value for it. If he takes the paper after it has matured he holds it subject to any equities existing between prior parties or subject to any infirmity of title in his vendor. So, also, he must have parted with something of value on account of the paper. This last condition has often been the subject of contention and has given rise to a most remarkable degree of difference in the courts of the country—not that any of them allow title to pass except upon a valuable consideration, but they differ as to what constitutes such consideration. It is admitted, indeed, that if any property has been given up in exchange for the paper the condition is fulfilled. So if it is accepted in discharge and satisfaction of an existing debt, though upon this point there was a line of cases in New York holding that receiving in discharge of an existing debt was not sufficient (Rosa v. Brotherson, 10 Wendell, 86). They reasoned that if the creditor sued on the note or bill which he had accepted in payment and failed to recover, then the original debt would revive (the consideration for the payment having entirely failed), and so they said he had really given up nothing. But was not the suspension (though only for a time) of the right to sue the original obligor anything? If the argument were good, then to receive the paper even in payment for goods sold would not be sufficient consideration, because upon failure to recover on the paper the vendor might sue and get back his goods. The rule

was, therefore, abandoned in later cases in that State (Mohawk Bk. v. Corey, 1 Hill, 518). And it is now universally settled that receiving negotiable paper in payment of an existing debt constitutes the creditor holding the paper a purchaser for value, and as such entitled to claim against all the world, just as if he had paid gold or silver or bank notes for the paper. But let us suppose the creditor receives the paper, not in payment but as collateral security for the existing debt, and upon this question we strike at once the most direct and astonishing difference between the courts of many States and also between the State courts and the United States courts, so that, very much to the confusion of the litigant, he finds that upon the very same state of case, in the very same community, he fails or succeeds on his claim according as it is passed on by State or United States judge.

The question was first distinctly presented in New York, in Bay v. Coddington, 5 Johns, Ch., 54, before Chancellor Kent. The plaintiff, Bay, being the owner of a vessel, employed R. and S. as his agents to sell her for him, on credit, and take good notes in payment. R. and S. sold the vessel and received notes endorsed in blank, which they frauduently transferred before maturity to defendants, I. and C. Coddington, as guaranty and indemnity against certain endorsements which the latter had previously made for R. and S. Plaintiff brought suit against the Coddingtons for the notes. The chancellor said the defendants are not to be protected as holders of the notes for value, for the notes were not negotiated to them in the usual course of trade or business, nor in payment of any antecedent and existing debt, nor for cash or property advanced, debt created or responsibility incurred on the strength and credit of the notes. It is the credit given the paper and the consideration bona fide paid on receiving it that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable frauds, and, therefore, defendants, who had received the notes as collateral security for the existing debt, were not allowed to retain them. The case was appealed and affirmed. In the appellate court it was said:

"The right to hold property against the owner in any case is an exception to the general rule of law; it is founded on principles of commercial policy. The reason of such a rule would seem to be that the innocent holder, having incurred loss by giving credit to the paper and having paid a fair equivalent, is entitled to protection. But what superior equity has the holder, who made no advances and incurred no responsibility on the credit of the paper he received, whose situation will be improved if he is allowed to retain, but if not, is in the condition he was before the paper was passed? To allow such a state of facts as sufficient to resist the title of the real owner would be productive of manifest injustice and is not required by any rule of policy; it is enough of the holder to secure when he advances his funds or makes himself liable on the credit of the paper he receives."

But shortly afterwards the question arose again in New York, but this time between a citizen of New York and a citizen of Maine, so that the action was brought in the United States Court and carried (upon a certificate of division in opinion) to the Supreme Court (Swift v. Tyson, 6 Peters, 1). Plaintiff had received a bill in payment of an existing debt; defendant, who was the acceptor, pleaded a defense good against the previous holder. The facts presented only the question of payment, but the court went beyond that and considered chiefly the question of receiving the bill as collateral security. Judge Story delivered the opinion of the court, and said:

"It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or secure his debt and thus may safely give a prolonged credit or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion that negotiable paper can not be applied in payment of or as security for pre-existing debts without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts."

In the following year the question again arose in New York (Stalker v. McDonald, 6 Hill, 93) in the State court, and was carried up to the court of errors in the hope that Swift v. Tyson would have a controlling weight and induce that tribunal to overrule Bay v. Coddington, but Chancellor Walworth stood by that case. He reviewed and criticised all of the authorities

cited by Judge Story, but added no new reasons to what had previously been said on his own side of the question.

In the meantime the question has arisen in many of the other States, including Kentucky. (Lee's Adm'r v. Smead, &c., 1 Met., Ky., 628; May v. Quimby, 8 Bush, 96; Kirkpatrick v. Muirhead, 16 Penn., 128; Petrie v. Clark, 11 S. & R., 377; Bramhall v. Beckett, 31 Maine, 205; Bertrand v. Bowman, 8 Ark., Eng., 150; Williams v. Little, 11 N. H., 66; Roxboro v. Messick, 6 Ohio St., 448; Ruddick v. Loyd, 15 Ia., 441, follow Bay v. Coddington).

But in the following the doctrine laid down in Swift v. Tyson by the Supreme Court has been followed: Manning v. McClure, 36 Ill., 490; Fisher v. Fisher, 98 Mass., 303; Stoddard v. Kimbell, 6 Cush., 469; Chicopee Bank v. Chapin, 8 Met. (Mass.), 40; Gibson v. Connor, 3 Ga., 47; Valette v. Mason, 1 Indiana, 288; Allaire v. Hartshorne, 21 N. J. L. (1 Zab.), 665; Maitland v. Citizens National Bank, 40 Md., 540; Greneaux v. Wheeler, 6 Texas, 51; Cobb v. Doyle, 7 R. I., 553; Stranghan v. Fairchild (Supreme Court of Indiana), 14 Central Law Journal, 413.

Thus the two cases, each with its respective followers, seem permanently arrayed against each other. Such a controversy is unfortunate, but it must be confessed the question is not without difficulty, and is one about which an honest difference may well exist. The former owner of the security urges that it is a great hardship if he is deprived of his property without his own consent and merely through another's fraud, the creditor who holds the security insists that he acquired it in ignorance of any fraud, and that he paid value for it. But the whole difficulty arises at this point. Did he pay value? Has he passed any consideration? True, Bay v. Coddington, supra, assumes that he has not, and starting from that point soon reaches the conclusion that he can not hold the security against the original owner. But the assumption is too gross, and is in fact taking for granted the very thing to be proved and avoiding the only debatable ground, for it is obvious the creditor has no case if he has paid no consideration. But is this assumption always correct? It is conceded that if the creditor expressly agreed to give time, that would be sufficient consid-

eration, but grant that no such express agreement were made, and suppose that the only facts that appear are that the debt was due; the creditor was pressing for payment; that the debtor delivered him the collateral; he accepted it and actually forbore to sue.

Do not these facts raise the presumption that the forbearance was in consideration of the additional security? Would a debtor voluntarily furnish his creditor with further security without anything in return? Would the creditor accept the security unless he intended to rely on it? And when he afterwards gives time, is not the time presumably in consideration of the additional security thus furnished by the debtor? The supposition is that there was no express promise to forbear, but it is believed that these facts give sufficient evidence of an implied promise on the part of the creditor. At any rate it is not fair to the difficulties of the question to start the discussion by assuming that there is no consideration (as all of the cases do that follow Bay v. Coddington), while in many, if not all of the cases holding contra this question of consideration is the chief point of discussion.

But whether this reasoning is or is not sufficient to remove the objection of no consideration, another consideration has been shown to exist in the recent case of Railroad Co. v. National Bank, 102 U. S., 14, which must be accepted as satisfactory. The court says that by the endorsement in blank and delivery to the creditor he acquires a property in the paper and becomes a party to it, assuming the duty of presenting it for payment and of giving notice of non-payment. This imposes upon him the obligation of a holder for value, and should, therefore, confer the rights of such a holder.

He has a property in the paper and is more than a mere agent entrusted with the possession for the purpose of collecting it, for if he were only such the debtor would still have the control of it and might withdraw it or reclaim it at any time, but as he can not do so in this case it shows the relation of the creditor to the paper, and that he is an owner and party to it. This is satisfactory as it answers the objection made in Bay v. Coddington and the cases behind that case, and we ought hereafter to find uniformity upon this point.

Uniformity is desirable in all branches of the law, but especially so in this particular one of which Cicero so forcibly

and elegantly says: Non erit alialex Romæ, alia alienis, alia nunc, alia post hac, sed et apud omnes gentes et omni tempore, una eademque lex obtinebit. There could be nothing more scandalous in the eyes of the nonprofessional than that he should find if he sued upon his note on one side of the street, in the U. S. Court, he would recover judgment, but if he crossed the street and went into the State court he would be nonsuited upon the very same note. It is hoped when this question comes up again in this (and other States that have followed Bay v. Coddington), Railroad Co. v. National Bank, supra, will receive careful consideration and be followed, or distinct and satisfactory reasons given for not doing so. Such accord in all the courts may be looked for with more reason when it is remarked that Chancellor Kent, who announced the doctrine of Bay v. Coddington, afterwards modified his views, for he says (3 Com., 81, note p): "Mr. Justice Story on Promissory Notes, 215, note 1, repeats and sustains the doctrine of Swift v. Tyson, and I am inclined to concur in that decision as the plainer and better doctrine."

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full—Alphabetically arranged according to their subject-matters.**

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Appeal—See Jurisdiction, 1, 3; Taxation, 2.

Assignment for Benefit of Creditors—

1. Refusal of creditor to accept—Homestead—A debtor made an assignment for the benefit of his creditors, which passed his entire estate, except such as was exempt from execution. Certain creditors declined to accept the provisions of the assignment for creditors generally, and saw proper to look for the payment of their debts to the homestead alone, which, as to them, was not exempt.

   Held—That it was proper to ascertain what the pro rata of these creditors would have been in the fund arising from the sale of the unexempted property, and after deducting that sum from their debts to subject the homestead to the payment of the balance. Simmons v. Phelps. November 3, 1883. Bullitt Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., aff. R. J. Myler for appellant; F. P. Straus for appellee.

2. Subsequent bankruptcy—A debtor conveyed all his property not exempt from execution in trust for creditors, "and to secure all of them" as far as he could, and subsequently became a voluntary bankrupt.

   Held—That creditors proving their claims in the bankrupt proceeding did not forfeit the right created by the deed to share in the proceeds of the property conveyed. Morris, &c. v. Tolle, Holton & Co., &c. November 26, 1883. Fleming Cir. Ct. Opin. by Presiding Judge Bowden, Sup. Ct., aff. W. H. Cord for appellants; W. O. Dodd for appellees.

Assignment of Errors—

1. Sufficiency of—An assignment as error that the court overruled appellant's motion to grant him a new trial "on the grounds set out in said motion" is sufficient to authorize the court to consider each of the new grounds for a new trial. Dulaney v. Nunnery. November 7, 1883. Kenton Cir. Ct. Opin. by Judge Bowden, Sup. Ct., granting appeal to Ct. of Ap. Pryor & Chambers and J. & J. W. Rodman for appellant; A. C. Ellis and C. H. Fisk for appellee.

2. Indefinite verdict—The verdict of the jury for the plaintiff in a certain amount, "to be credited by three barrels of corn at the prevailing price in 1877," should not have been received because it was for an indefinite amount, and the assignment as error that the court refused a new trial because there was no evidence to support the verdict raises the question as to the sufficiency of the verdict. Whitney v. Mulligan's Administrator. November 19, 1883. Allen Cir. Ct. Opin. by Presiding Judge Bowden, Sup. Ct., rev. Leslie & Botts, M. A. Alexander and Lewis McQuown for appellant; John E. DuBose and W. E. Settle for appellee.

Assignor and Assignee—See Bills and Notes.

Benevolent Orders—

1. Member's right of action—The courts will not interfere to control the administration of the laws of merely voluntary associations, or to enforce the rights springing therefrom, but such organizations must be left to enforce their rules and regulations by such means as they may adopt for their government, and no relief will be granted until the remedies within the body have been exhausted.
2. A benevolent order is not exempt from actions in the civil courts by its members to enforce their rights, unless the laws confer upon it the exclusive right to pass upon questions affecting those rights.
3. Where the constitution, rules and by-laws of a subordinate lodge of Odd Fellows, by which alone its members agree to be bound upon their reception into the body, provide no tribunal for the determination of the right of a member to sick benefits, any member can maintain a civil action to recover such benefits as he may be entitled to.
4. The fact that the laws of appellant provide that any sick brother shall report to the noble grand, whose duty it shall be to draw on the treasurer for the sum allowed by law, if satisfied that the brother is entitled to sick benefits, does not make final his decision, he being merely the agent of the lodge without any judicial authority. Kentucky Lodge, No. 39, I. O. O. F. v. White. November 16, 1883. Gallatin Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. J. J. Landram for appellant; Geo. C. Drane for appellee.

Bills and Notes—

1. Equities—Assignor and assignee—When the assignee of a note agrees with the assignor to pay him a part of the money collected on the note the assignor can not set up any equity, by reason of the agreement, against a subsequent assignee. Buckler v. Henson, &c. November 26, 1883. Robertson Cir. Ct. Opin. by Judge Reid, Sup. Ct., rev. W. Buckler for appellant; Thomas Owens for appellees.
2. Equities—Want of notice—The assignee of a note which recites that it is for the purchase money of land can not be affected by an equity of the payor growing out of a consideration in addition to that expressed, of which the assignee had no notice. Ambrose, &c. v. Tabb, &c. November 28, 1883. Mason Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. W. H. Wadsworth for appellants.

Bond, Bail—

Defense—Sickness—Such sickness of the accused as rendered attendance upon court impossible, and was not negligently produced, is a sufficient defense to a proceeding on his forfeited bail bond. Hopkins v. Commonwealth. November 12, 1883. Christian Cir. Ct. Opin. by Presiding Judge Bowden. Sup. Ct., rev. G A. Champlin for appellant; P. W. Hardin for appellee.

Bond, Guardian's—

Insufficient sureties—County judge's liability—Proof that a county judge has taken sureties upon a guardian's bond who were insolvent is not sufficient to render him liable to the ward for damage thereby. It must appear from the proof as well as from the pleadings that the judge negligently failed to make proper inquiry as to the sufficiency of the sureties. Chevis, By, &c. v. Lytle, &c. November 7, 1883. Lincoln Cir. Ct. Opinion by Judge Richards, Sup. Ct., aff. Welch & Saufley for appellants; J. W. Alcorn for appellees.

Charitable Uses—

1. Definite devise—A devise of a certain sum to trustees "to be devoted by them to such benevolent objects and purposes as they may select," the testator requesting them in making the distribution "to give preference to chaarities connected with or under the control of the Christian brotherhood," is upheld as sufficiently certain and definite.
2. Devise to under the General Statutes—A devise to trustees for benevolent purposes is good under the statute, although not a devise to a public or private charity.
3. Construction of will—A testator directed his executors to retain control for five years of certain mountain land, valuable only for the coal under its surface, and then sell it and divide the proceeds between certain parties, directing that, in the meantime, a certain sum should be paid to his widow and children out of the rents and profits. It appearing that the opening and development of the mines would enhance their value, it is held that the land should be leased, as it was undoubtedly the expectation of the testator that the land would be so used as to produce an income for the support of his family. Givens' Adm'r v. Shouse. November 22, 1883. Lincoln Cir. Ct. Opin. by Judge Pryor, Ct. Ap., rev. Ward & McAfee and Sam Harding for appellant; Hill & Alcorn for appellee.

Commissioner—See Practice in Civil Cases, 4, 5.

Consideration—

Accepting part of a debt for the whole—Where one creditor signs an agreement to take a part of his debt in satisfaction of the whole, in consideration that other creditors will do the same, the agreement when completed is binding upon all; but where one creditor simply agrees to give up a part of his debt if other creditors will agree to give up a part of their debts, there is no consideration for the agreement, and it is not binding. Rosenthall v. Jacobs. November 19, 1883. Louisville Chancery Ct. Opin. by Judge Richards, Sup. Ct., rev. Lewis Collins for appellant; M. Lieber for appellee.

Contribution—

Widow who accepts her husband's devise must contribute her share towards paying the debts of the estate. Hinson, &c. v. Ennis, ante 367.

County Judge—See Bond, Guardian's.

Criminal Law—See Practice in Criminal Cases—

1. Involuntary manslaughter—Involuntary manslaughter is the killing of another in doing some unlawful act, but without an intention to kill; and this may be either when the act is directed against the person killed or when it is directed against another person or thing, and kills one not intended to be hurt. Quinn v. Commonwealth. November 8, 1883. Rockcastle Cir. Ct. Opin. by Judge Pryor, Ct. Ap., aff. F. H. Reppert, Geo. W. McClure, Jno. W. Brown and Sam M. Burdett for appellant; P. W. Hardin for appellee.
2. Threat—No excuse for taking life. Fitzpatrick v. Commonwealth, ante 363.

Debtor and Creditor—

Garnishees—A creditor has no right to proceed against his debtor's debtor otherwise than as a garnishee until after the latter has failed to make a response satisfactory to the plaintiff, unless the plaintiff proceeds upon a judgment and execution returned "no property found" as to all or part of his debt. Brown & Reid v. Ferguson, &c. November 7, 1883. Greenup Cir. Ct. Opin. by Presiding Judge Bowden. Sup. Ct., aff. Roe & Roe for appellants; McCoy for appellees.

Deed—

Delivery of is necessary to its validity, acknowledgment is prima facie evidence of delivery only. Alexander, &c. v. De Kermel, &c., ante 382.

Demurrer—

An order overruling a demurrer is not final or appealable. Alexander, &c. v. De Kermel, &c., also L. &. N. R. R. Co. v. Simmons, ante 382, 390.

Donatio Causa Mortis—

What is sufficient delivery of a chose in action. Stephenson's Adm'r v. King, &c., ante 374.

Estoppel—

Failure to record deed—Subsequent partition—Suit—Although the failure of the grantee in a deed from a married woman to have his deed recorded in the proper time may have affected his title, yet the land having been subsequently allotted to the grantee by a proceeding in the county court for partition to which the grantors were parties, they and those claiming under them are estopped to assert any claim to the land as against the grantee or his vendees. Singleton v. Singleton &c. November 8, 1883. Woodford Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., aff. D. L. Thornton for appellant.

Evidence—See Practice in Criminal Cases, 5, 6—

That a murderer is unlearned and passionate is inadmissible. Fitzpatrick v. Commonwealth, ante 363.

**Feme Sole—**

Judgment making a married woman, operates during existing marriage only. Duke's Heirs v. Duke's Devisees, ante 347.

**Ferry—**

1. The transportation by a merchant of his customers across a water course, within one mile of an established ferry, is a transportation for "reward" within the meaning of General Statutes, section 19, chapter 42.
2. Section 20 of chapter 42, which provides that no ferry shall be established within a mile of the place at which any existing ferry has been pre-established, unless it be "where an impassable stream intervenes," has no reference to a case where an unauthorized person transports persons across a water course within one mile of an established ferry. Kevil v. Wharton. November 3, 1883. Lyon Cir. Ct. Opin. by Judge Lewis, Ct. of Ap., aff. T. J. Watkins for appellant; J. G. Husbands and R. W. Wake for appellee.

**Final Order—See Demurrer—**

1. An order overruling a motion to set aside an order allowing an answer to be filed, and to set aside an order vacating a judgment and re-enter the judgment, is not final and can not be appealed from.
2. Section 763 of the Code has reference only to final judgments or orders, and not to interlocutory orders. Bayse v. Lindenberger, &c. November 28, 1883. Jefferson Ct. Com. Pl. Opin. by Judge Reid, Sup. Ct., dis. Elliott & Hemingray for appellant; John Stites for appellees.
3. Option of court not a—A litigant can not appeal from an opinion of the court which is neither binding upon the parties nor the court, but may be changed at any time before the judgment is entered.

   The chancellor having allowed a fee to an attorney to be paid out of a certain fund in court, without directing to whom it is to be charged in the distribution of the fund, simply intimating his intention to charge it in a certain way, the order is not final, and appellants, who are some of the distributees of the fund, can not prosecute an appeal upon the ground that no part of the fee should be charged to them. Stoll, &c. v. Stoll. November 23, 1883. Louisville Ch. Ct. Opin. by Judge Richards, Sup. Ct., dis. Elliott & Hemingray for appellants; Alex. P. Humprey for appellee.

**Frauds, Statute of—**

A sale of land by parol is not void as between the parties, and actual possession by the vendee under such a purchase is notice to an execution purchaser. Secret's Trustee v. Wade, &c. November 8, 1883. Grant Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., aff. Collins & Fenley for appellant; J. J. Landram for appellees.

**Homestead—See Assignment for Benefit of Creditors –**

1. It appeared from the schedule filed by a bankrupt that some of the debts due by him were created prior to the homestead act of 1866, the amount of which was about what a house and lot owned by the bankrupt sold for at a sale made by the assignee. In an action by the bankrupt and his wife, claiming a homestead in this house and lot, it is held that they can not recover. Although the wife was not a party to the

proceedings in bankruptcy, she is concluded thereby, she being represented by her husband. Kennedy, &c. v. Jelf, &c. November 10, 1883. Mercer Ct. of Com. Pl. Opin. by Judge Lewis, Ct. Ap., aff. Thompson & Thompson and T. C. Bell for appellants.

2. The debtor is entitled to the homestead exemption although the dwelling house occupied by himself and family is located upon a tract belonging to his wife, adjoining that claimed as exempt, provided the value of the whole so occupied and used by him, including that owned by his wife, does not exceed $1,000. Oliver, &c. v. Hayden. November 24, 1883. Owen Cir. Ct. Opin. by Judge Lewis, Ct. A., aff. Geo. C. Drane for appellants; D. W. & J. B. Lindsey for appellee.

3. Waiver of—The homestead exemption can not be waived except by writing, subscribed by both husband and wife, acknowledged and recorded; but the right to the exemption terminates whenever the debtor ceases to be a housekeeper or removes permanently from the premises.

4. Removal—Pending an action in the circuit court to foreclose a mortgage upon a house and lot, the judge of the county court made an order appointing a receiver to take charge of the property, who, in obedience thereto, leased the property, the mortgagor becoming the tenant. The order of the county court, although authorized, was acquiesced in by the circuit court, and the acts of the receiver confirmed without objection. Prior to the decree of sale the mortgagor with his family removed from the mortgaged premises, and made no claim to homestead until eleven years after the sale.

Held—That the removal must be regarded as not merely temporary, but permanent, and made with the purpose of abandoning the possession, nor can it be regarded as compulsory. The order appointing a receiver was not effectual to dispossess the mortgagor. Mudd, &c. v. Clement, &c. November 17, 1883. Washington Cir. Ct. Opinion by Judge Lewis, Ct. Ap., aff. John W. Lewis, W. E. Seleeman, L. R. Thurman and Breckinridge & McChord for appellants; J. W. S. Clement and W. E. & S. A. Russell for appellees.

Husband and Wife—See Homestead, 1—

1. Liability of wife for money collected by him—When the husband, in the name of the wife, has collected money to which she was not entitled, she is not liable therefor unless the money was applied to her use. Husband and wife recovered judgment against the surety of the wife's guardian, which was collected by the husband. The judgment having been reversed, it is held that the surety can not hold the property of the wife liable for the amount of the judgment paid to the husband unless it be made to appear that the money was applied to the use of the wife. Spratt, &c. v. Hugart. November 1, 1883. Bath Cir. Ct. Opin. by Judge Pryor, Ct. Ap., rev. Reid & Stone for appellants; R. Gudgell & Son and W. H. Holt for appellee.

2. He has no estate in her lands during her lifetime that he can sell. Johnson, &c. v. Seweatt, ante 358.

Improvements—

Vendor and vendee—Rescission—A vendee whose contract is rescinded at the instance of the vendor is entitled, in the absence of fraud, to pay for improvements put upon the land up to the time a rescission is decreed to the extent they have enhanced the value of the land. The vendee is

held in this case to be entitled to pay for improvements put upon the land after the vendor instituted suit for a rescission. Winsott's Executor v. Hutchings, &c. November 13, 1883. Daviess Cir. Ct. Opin. by Judge Hines, Ct. Ap., aff. Williams & Powers for appellant; Little & Slack and W. N. Sweeney for appellees.

Indictment—See Practice in Criminal Cases, 7, 12.

Injunction—

1. Failure to give notice—Dissolving—Although section 276 of the Code be not technically complied with by the officer granting an injunction, yet where the case is one in which an injunction is authorized under that section, and in which the court would have been authorized to immediately reinstate the injunction, if it had been dissolved, the substantial rights of the defendant are not prejudiced by the failure of the court to sustain his motion to dissolve the injunction. Kivel v. Wharton. November 3, 1883. Lyon Cir. Ct. Opin. by Judge Lewis, Ct. Ap., aff. T. J. Watkins for appellant; J. G. Husbands and R. W. Wake for appellee.
2. Illegal tax—An injunction lies to restrain the collection of an illegal tax. Bierly v. Warder. November 7, 1883. Lewis Cir. Ct. Opin. by Judge Richards, Sup. Ct., rev. T. W. Mitchell for appellant; Samuel J. Pugh for appellee.
3. Against a nuisance, when injunction will be granted. Seifried v. Hays, &c., ante 369.

Insurance—

1. Stipulations in policies—Parties may insert in a policy of insurance such stipulations as they choose, and they will be binding if not in violation of public policy.
2. Default in premiums—The provisions in a policy of insurance that the company "shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premium due by the terms of the installment note" is binding upon the holder of the policy. Blakesley v. Continental Insurance Co. November 12, 1883. Henry Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. Carroll & Barbour and E. J. Tyler for appellant; John D. Carroll for appellee.

Judgments—See Assignment of Errors, 2; Husband and Wife, 1—

Reversal—No supersedeas—Personal Representative—Where one of two persons, each of whom was claiming to be entitled to a legacy in the hands of an executor, recovered judgment against the executor for the amount of the legacy in an action to which the other claimant was a party, the unsuccessful claimant had the right to supersede the judgment, and failing to do so, the executor should be protected in his payment of the legacy to the claimant in whose favor judgment was rendered, the judgment having been reversed. Showalter v. Simmons. Bullitt Cir. Ct. November 7, 1883. Opin. by Judge Reid, Sup. Ct., rev. F. P. Straus for appellant; E. Badger and R. McConathy for appellee.

Judicial Sale—

1. For reinvestment—The fact that a will forbids the alienation of a life estate devised does not prevent the sale of the property for reinvestment under section 491 of the Code.
2. Pleading—Void sale—In such a proceeding the facts showing that the sale will benefit the parties interested in the property should be stated in the petition, as well as proved, but the failure to state them does not render the sale void; nor does it affect the title of the purchaser under the decree which may, on that account, be subject to reversal at the instance of a party to the suit, or a privy of such party. Buddeke v. Clay, &c. November 1, 1883. Louisville Ch. Ct. Opin. by Chief Justice Hargis, Ct. of Ap., aff. Byron Bacon for appellant; John B. Baskin for appellees.

Jurisdiction—

1. Appellate—Lien—Where the amount in controversy is less than $100, the fact that a lien upon land is sought to be enforced is not sufficient to give jurisdiction of the appeal. Stackhouse v. Mt. Gilead Baptist Church. November 13, 1883. Green Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., dis. John W. Lewis for appellant; Ward & Henry for appellee.
2. Ibid—Ibid—Where the amount in controversy is less than $100 the fact that a lien upon land is adjudged to exist and its enforcement provided for will not give jurisdiction of the appeal. Mulholland, &c. v. Selvage & Snyder. Nov. 12, 1883. Louisville Ch. Ct. Opin. by Presiding Judge Bowden, Sup. Ct., dis. Mix & Rogers for appellants; A. P. Humphrey for appellees.
3. Amount in controversy—The only complaint upon this appeal being that judgment was for $267.96 when it should have been for only $206.15, the court has no jurisdiction of the appeal, the amount being less than $100. Logan v. Davis, &c. November 7, 1883. Louisville Ch. Ct. Opin. by Judge Richards, Sup. Ct., dis. J. R. Green for appellant; Emmet Field for appellees.

License—

1. By an act of March 8, 1872, it was provided that no license to sell liquors by retail should thereafter be granted by the trustees of the town of Catlettsburg. On the 11th of February, 1882, the question of license or no license was submitted to the popular vote, resulting in a majority favoring the license. March 29, 1882, the charter of the town was amended so as to authorize the trustees to impose a tax upon the sale of liquors by retail, the amendment providing that the parties before selling should execute a bond conditioned to keep an orderly house, etc.

   Held—That the power to grant the license, if not restored by the popular vote, was certainly restored by the subsequent amendment to the charter, and that no form of license is required. The payment of the tax and the execution of the bond operate as a license. Gallagher v. Meek, &c. November 10, 1883. Boyd Cir. Ct. Opin. by Judge Pryor, Ct. Ap., rev. R. C. Burns for appellant; H. L. Boggs for appellees.

**Limitations, Statutes of**—See Taxation, 3, 4; Vendor and Vendee, 1—

1. As to adverse possession against married woman. Bransom, &c. v. Thornton, &c. ante 359.
2. As to adverse possession against remainderman. Ibid, 359.

**Misrepresentation**—

Assignment of contract—A assigned to B a contract with C for the sawing of lumber by which A was to have one-half of the entire profits, but not to receive anything until C should be paid for his mill. A made no representation to B as to the time of the division of the profits. Held —That A was not guilty of misrepresenting the terms of the contract. Ambrose, &c. v. Tabb, &c. November 28, 1883. Mason Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. W. H. Wadsworth for appellants.

**Mortgage**—See Purchaser, 1, 2.

**Negligence**—

1. Gross and willful defined, also ordinary care. L. & N. R. R. Co. v. McCoy, ante 397.
2. When the injured party is entitled to punitive damages. Ibid.
3. Instruction—In an action under the statute for willful neglect it is error to instruct the jury that certain facts, if they exist, constitute such neglect. The court should tell the jury in general terms what constitutes such neglect, and leave it for them to determine whether it exists in the particular case. Richmond & Lexington Turnpike Road Co. v. Foley. November 7, 1883. Fayette Cir. Ct. Opin. by Judge Richards, Sup. Ct., rev. Breckinridge & Shelby for appellant; Z. Gibbons for appellee.

**New Trial**—See Assignment of Errors, 1—

Particularity with which grounds for must be set out. L. & N. R. R. Co. v. McCoy, ante 397.

**Nuisance**—

A slaughter house is a nuisance, and the fact that it was originally built remote from human habitation is no defense. Seifried v. Hays, &c., ante 369.

**Penitentiary**—

Keeper—Escaped convict—Reward—Whoever is keeper of the penitentiary at the time of the return of an escaped convict is liable for the reward which the statute provides shall be paid.

The appellant, upon the death of the keeper of the penitentiary, having taken control thereof at the request of the governor and auditor, for the purpose of looking to the discipline and welfare of the convicts and the protection of the property of the State until further notice, is not liable for the reward for the capture of an escaped convict returned while he was in control. He was in no sense the keeper. South v. Julian, &c. November 21, 1883. Franklin Cir. Ct. Opin. by Judge Reid, Sup. Ct., rev. Frank Chinn for appellant; Ira Julian for appellees.

**Pension Money**—

Liable for debt—Pension money is not exempt from seizure for the pensioner's debts after it has come into his hands. Moxley v. Andrews. Same v. Hurt. November 12, 1883. Fleming Cir. Ct. Opin. by Judge

Richards, Sup. Ct., aff. W. J. Hendricks, James W. Shouse, C. C. Davis and W. H. Cord, Jr., for appellant; W. A. Sudduth, A. Duvall, Wm. Lindsay and M. M. Teager for appellees.

Personal Representative—See Judgment, 1.

Pleading—

1. Trespass—In an action of trespass at common law, the plaintiff having set forth the boundary of his land and alleged that the trespass was committed at a particular locality within that boundary, the defendant must either deny the trespass or plead facts showing that he was the real owner. Under our system of pleading the defendant can not be compelled to plead the evidence of his title, and when the action is trespass quare clausum fregit, a plea in susbtance that the defendant was in the actual possession of the close, and was in fact the owner, and that the entry was on his possession by the plaintiff, and no trespass or entry was made by the defendant, is sufficient. Latta, &c. v. Redden, &c. November 28, 1883. Anderson Cir. Ct. Opin. by Judge Pryor, Ct. Ap., aff. J. H. D. McKee for appellants; D. W. Lindsey for appellees.
2. Action to surcharge administrator's settlement—The settlement of an administrator with the county court is prima facie correct, and in a petition to surcharge the settlement the objections thereto must be specifically set forth. Smith's Adm'rs v. Nuckols, &c. November 17, 1883. Calloway Cir. Ct. Opin. by Judge Pryor, Ct. Ap., rev. W. W. Robertson and W. P. D. Bush for appellants; W. M. Smith, W. L. Weathers and E. W. Hines for appellees.
3. Assault and battery—Special damages—In an action for assault and battery, where a recovery is sought not only for the general damages for the battery, but also for loss of time or labor or service, or for money paid out in doctor's bills incurred during the sickness resulting from the battery, the petition must state the facts upon which the right to such special damage is claimed, in order to authorize a recovery therefor. Pepper v. Twyman. November 7, 1883. Woodford Cir. Ct. Opin. by Judge Reid, Sup. Ct., rev. D. L. Thornton for appellant; Porter & Wallace for appellee.

Power of Attorney—

Revocation of. Bransom, &c. v. Thompson, &c., ante 359.

Practice in Civil Cases—See Usury, 2—

1. Suit by next friend—If the failure of the person suing as next friend to make the affidavit showing his right to sue in that capacity, as required by section 37 of the Code, be ground for the dismissal of the action, it is too late after answer filed to make the motion to dismiss for want of the affidavit, and in this case the affidavit tendered when the motion to dismiss was made ought to have been filed.
2. Waiver—The plaintiff, by attending upon the taking of depositions by the defendant and cross-examining witnesses, waived notice of the filing of the defendant's answer in the clerk's office. Staton, &c. v. Bryant. November 3, 1883. Casey Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., rev. Stone & Stone for appellants.

3. Writ of possession—A defendant having been brought into court upon notice that the case would be redocketed and a deed asked to be made to the purchaser with a writ of possession, has the right to show that the writ ought not to go, although it may be true that the writ could have been issued without notice. Smith, &c. v. Lewis. November 3, 1883. Hardin Cir. Ct. Opin. by Judge Pryor, Ct. Ap., aff. Wilson, Hobson & Sprigg and D. C. Haycraft for appellants.

4. Directions to commissioner—When a commissioner is directed to sell a tract of land in separate lots it is not necessary that the court should designate the order in which the lots or parcels should be sold by the commissioner or which are to be left unsold in case less than the whole quantity should suffice to satisfy the judgment.

5. Allowance to—The reasonableness of the allowance to the commissioner can not be considered, he not being a party to the appeal. Perry v. Torian. November 13, 1883. Graves Cir. Ct. Opin. by Judge Lewis, Ct. Ap., aff. L. Anderson for appellant; W. W. Tice for appellee.

6. Limiting the number of witnesses—Where an application is made to the court to confine the allowance of witnesses, to be taxed as part of the cost, to two to any one point, the matter is vested in the sound discretion of the court, and its action will not be reviewed unless that discretion has been manifestly abused. Pepper v. Twyman. November 7, 1883. Woodford Cir. Ct. Opin. by Judge Reid, Sup. Ct., rev. D. L. Thornton for appellant; Porter & Wallace for appellee.

7. Effect of appeal—Clerical misprision—After an appeal has been granted from a judgment the lower court has no further control over the action except for the purpose of enforcing the judgment. It can not, therefore, entertain a motion to correct the judgment for a clerical misprision. City of Covington v. Hoadley, &c. November 23, 1883. Kenton Ch. Ct. Opin. by Judge Reid, Sup. Ct., rev. T. F. Hallam for appellant; Carlisle & Goebel for appellees.

Practice in Criminal Cases—

1. Instruction—Manslaughter—The deceased having been killed by a blow from a stone weighing two pounds thrown at him with violence by the accused, who must be presumed to have known that such a blow would kill his adversary, no instruction as to involuntary manslaughter was proper. Quinn v. Commonwealth. November 8, 1883. Rockcastle Cir. Ct. Opin. by Judge Pryor, Ct. of Ap., aff. F. H. Reppert, Geo. W. McClure, John W. Brown and Sam M. Burdett for appellant; P. W. Hardin for appellee.

2. Instruction—Manslaughter—Upon the trial of appellant, under an indictment for murder, the jury were properly instructed that if they found the accused was present at the time of the killing, and "advised, aided or incited" the crime, that she was guilty of manslaughter, provided the killing occurred during a sudden quarrel between the deceased, the accused and the person doing the killing; but if they found the killing was the result of premeditation or previous agreement or understanding between the accused and the person doing the killing,

they should find the accused guilty of murder. Miller v. Commonwealth. November 8, 1883. Fayette Cir. Ct. Opin. by Judge Hines, Ct. of Ap., aff. Morton & Parker for appellant; P. W. Hardin for appellee.

3. Instruction—Manslaughter—It was not error to refuse an instruction as to involuntary manslaughter, there being no evidence tending to show that the killing was not intentional.

4. The court having instructed the jury that in a hypothetical state of case the defendant "had the right to use any and all means then at his command that were necessary, or apparently necessary," to ward off the apparently impending danger, the defendant was not prejudiced by the refusal of the court to add the words "even to the taking of life." Stansifer v. Commonwealth. November 1, 1883. Grant Cir. Ct. Opin. by Judge Lewis, Ct. of Ap., aff. W. Montfort for appellant; P. W. Hardin for appellee.

5. Conspiracy—Evidence—When two or more persons are jointly indicted they are competent witnesses for each other, although a conspiracy is charged in the indictment, unless the evidence, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy.

6. Accomplice—Corroboration—The testimony of an accomplice as to the existence of the alleged conspiracy should be corroborated in order to disqualify one of the defendants as a witness for the other. Fleming v. Commonwealth. November 1, 1883. Carter Cir. Ct. Opin. by Judge Lewis, Ct. of Ap., rev. Wm. Bowling and J. D. Jones for appellant; P. W. Hardin for appellee.

7. Keeping tippling house—Indictment—An indictment which in substance charges the defendant with keeping a tippling house, committed by keeping a tippling house, without any further statement of the acts constituting the offense, is sufficient under the decisions of the Court of Appeals. Long v. Commonwealth. November 26, 1883. Lewis Cir. Ct. Opin. by Judge Richards. Sup. Ct., aff. W. L. Fitch for appellant; P. W. Hardin for appellee.

(See also on this point Pearce v. Commonwealth, ante 407.)

8. Keeping tippling house for three months—An indictment which in substance charges the defendant with keeping a tippling house for three months, committed by keeping a tippling house for three months next before the finding of the indictment, is sufficient.

9. Distinct offenses—Keeping a tippling house for three months at anyone time is a separate and distinct offense from that of simply keeping a tippling house, and the court properly refused to strike from an indictment for the former offense the allegation as to the length of time the house was kept.

10. Time not material—Time is not a material ingredient of this offense except to show that the house was kept for three months at one time, and the Commonwealth was not limited by reason of the allegation in the indictment that the defendant "kept a tippling house for three months next before the finding of the indictment" to proving that the house was kept for the three months named. Reason v. Commonwealth. November 12, 1883. Graves Cir. Ct. Opin. by Judge Richards, Sup. Ct., aff. S. H. Crossland for appellant; P. W. Hardin for appellee.

11. Misdemeanors—Indictment—Under the charter of the city of Paducah, which confers upon the city court jurisdiction concurrent with the circuit court of the county of all misdemeanors occurring in the city, where the fine does not exceed $500 and the imprisonment does not exceed twelve months, the interposition of a grand jury by way of presentment or indictment is not necessary, the charter providing that the proceeding shall be by warrant of arrest issued by the clerk of the city court. Commonwealth v. Fleece. November 12, 1883. McCracken Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. Charles H. Thomas for appellant.
12. Selling liquor on Sunday—Indictment—Selling spirituous liquors on Sunday and giving spirituous liquors on Sunday are distinct offenses, and an indictment which charges the defendant with both offenses is insufficient. Commonwealth v. Melingin. November 12, 1883. Marshall Cir. Ct. Opin. by Judge Reid, Sup. Ct., aff. P. W. Hardin for appellant.
13. Pleading autrefois. Pearce v. Commonwealth, ante 407.

Presumption—

1. In absence of pleadings—In the absence of the pleadings from the record the presumption is that they authorized the judgment, regardless of the evidence. Tucker v. Medsker, &c. November 7, 1883. Marion Cir. Ct. Opin. by Presiding Judge Bowden, Sup. Ct., aff. Russell & Avritt, Hill & Rives and A. B. Duvall for appellant; A. B. Marshall for appellees.
2. As to completeness of chancery record—Where the record in a chancery cause fails to show testimony other than that contained in the record was introduced on the trial of exceptions to the master's report, the presumption is that the exceptions were tried on the evidence alone appearing in the record, but where the record discloses affirmatively that oral testimony was heard, and that testimony is not brought before a revisory court by bill of exceptions, the presumption is that it was sufficient to support the judgment of the court below. Green v. Literal, &c. November 19, 1883. Carter Cir. Ct. Opin. of the court by Judge Reid, Sup. Ct., rev. R. D. Handy for appellant; W. C. Ireland and E. F. Dulin for appellees.

Purchaser—See Vendor and Vendee—

1. A mortgagee is a purchaser for value.
2. Rights of—Notice—Twenty-six years after the execution of a deed appellants instituted this action to correct the deed on the ground of fraud or mistake, claiming that the deed should have been executed to them jointly with the grantee. Prior to the institution of this action the grantee had executed a mortgage upon the land which had been purchased and the property sold. Held—That the rights of the purchaser can not be disturbed, there being no allegation of notice on his part of the equity of appellants. Lewis, &c. v. Carr, &c. November 28, 1883. Caldwell Cir. Ct. Opin. by Judge Pryor, Ct. Ap., aff. Geo. W. Duvall and T. H. Lowry for appellants; P. H. Darby for appellees.

Reversions—

Common law doctrine of still prevails in this State. Alexander v. De Kermel, ante 382.

Right of way—

The appellant, by contract with the owner of land upon which was a quarry, had the right to take stone from the quarry, and was entitled to a way to the quarry. Upon the death of the owner of the land and its division among his children it became necessary to change the way which the appellant had been using for twenty years.

Held—That the appellant is entitled to a passway at the expense of the owners of the land, and not at its own expense. Louisville Turnpike Co. v. Shadburn. November 28, 1883. Lou. Ch. Ct. Opin. by Judge Pryor, Ct. Ap., rev. James Speed for appellant; P. A. Gaertner for appellee.

Sale—See Judicial Sale; Taxation, 2.

Separate Estate—

Limitations on the alienation of separate estate under the Revised Statutes. Duke's Heirs v. Duke's Devisees, ante 347.

Shelley's Case, Rule in—

Is abolished in this State, though common law doctrine of reversions prevails here. Alexander, &c. v. De Kermel, &c., ante 382.

Stock—

1. Mortgage of in a corporation is not a recordable instrument. Spaulding v. Paine's Adm'r, ante 391.
2. Certificate of is transferred by endorsement and delivery. Ibid.

Supersedeas—See Judgments.

Taxation—See Injunction, 2—

1. Sale for taxes—It was the duty of the sheriff in selling for taxes several lots of the same owner to offer them separately, each one of them being worth much more than the amount of taxes due, and a sale of the lots in one body was void.
2. Reversible error—The failure of the court to adjudge to the purchaser thirty per cent. on $4.35, the amount bid by her, will not authorize a reversal, the amount being too small. Vineyard v. Gilbert, &c. November 22, 1883. Hart Cir. Ct. Opin. by Judge Lewis, Ct. Ap., aff. Leslie & Botts and D. W. Lindsey for appellant; H. C. Martin for appellees.
3. Limitation—When begins to run—Under an act providing that all actions against the city of Covington to recover taxes which have been "illegally or erroneously collected" shall be prosecuted within six months after the cause of action arose, the statute begins to run the instant the payment is made, regardless of the time when the discovery may be made that the assessment was illegal.
4. Particular statute construed—The operation of the statute is not limited to cases where the property is within taxing power, and where there has been irregularity in the levy, assessment or collection, but extends to any case where the citizen has paid taxes which the city had no right to exact, no matter whether the property was not within the taxing power or whether the method pursued in collecting was unauthorized. City of Covington v. Hoadley, &c. November 23, 1883. Opin. by Judge Reid, Sup. Ct., rev. T. F. Hallam for appellant; Carlisle & Goebel for appellees.

Trespass—See Pleading, 1.

Usury—

1. Not personal plea—The plea of usury is not a personal privilege, but may be interposed by a junior lien holder as against a prior lien where the property is sought to be subject to satisfy the liens.

   An execution plaintiff who has had his execution levied upon property of the debtor to another may apply to the chancellor to have payments of usury made by the mortgagor to the mortgagee applied to the principal of the mortgage debt.

2. Pleading—The court properly refused to allow an amended answer to be filed to conform to the proof, as it was not offered until after submission, and no reason was shown why it was not offered sooner; nor was it shown that the admission in the original answer, which the amendment was intended to correct, was made by mistake or oversight. Sloss' Ex'or v. Levi, &c. November 8, 1883. Louisville Chan. Ct. Opin. by Judge Pryor, Ct. Ap., aff. I. & J. Caldwell & Winston for appellant; Rodman & Brown and W. R. Abbott for appellees.

Vendor and Vendee—See Improvements—

Limitation—Innocent purchaser—Lien—It was too late for the vendor, after the lapse of twenty-eight years, to enforce his lien as against innocent purchasers without actual notice. Smith & Nixon v. Myer's Adm'r. November 13, 1883. Grant Cir. Ct. Opin. by Judge Pryor, Ct. Ap., aff. Collins & Flenley for appellants; E. H. Smith for appellee.

Will—See Charitable Use, 3.

THE

# KENTUCKY LAW REPORTER.

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## CURRENT TOPICS.

It is said that by a recent amendment to the Constitution of New Hampshire the number of cases annually tried by jury there has been reduced fully two-thirds. In 1882-83 the whole number tried in the State was seventy-five only. The Constitution takes away the right to trial by jury in all cases except where the title to real estate is involved, or the amount in controversy equals a certain sum.

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Tennyson, the poet, has lately been created a peer, and, as such, is entitled to a seat in the English House of Lords. This brings out the following from the London Truth: "That Tennyson should receive the personal recognition and admiration of his countrymen would be proper, but to make him, his son and his son's son a legislator is a proceeding as exquisite in absurdity as to create the peer hereditary poet." But the fact is that the very existence and construction of the House of Lords is an absurdity, founded on the principle of heredity and made up, as it is so largely, of men who owe their membership not to any distinguished public services rendered by themselves, but merely to the accident of birth and to the fact that some

remote ancestor has been a person of more or less merit. Of 500 peers, 450 perhaps have no other claim to their titles than that of inheritance. Tennyson is a man of rare intellect and is not likely to bring discredit on anybody that he belongs to, and he is as certainly likely to prove a useful legislator as the Earl of Shrewsbury, who has just simultaneously come of age and eloped with the wife of a brother peer; or the Duke of Hamilton, who has so lately converted his great palace into a huge auction room and put up for sale its contents, consisting of rare treasures of art collected by his ancestors, in order to supply himself with the means of gratifying his passing pleasures. It does seem that even a poet could make better laws than such men.

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The privileges of counsel are certainly carried to a very high point in a case recently decided in the English Court of Appeal, where it held that an attorney is not liable in a civil action for libel for anything said by him while acting as counsel, although the speech may have been malicious, in the sense that it was not made for the purpose of doing anything for the defense of his client, and there was no justification or ground for it whatever, except it was made in anger against the opposite party. (Munster v. Lamb, 49 L. T. Rep., N. S., 253.)

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Gov. Butler, of Massachusetts, has recently appointed a colored man to a judgship in Charlestown. The court is one of inferior jurisdiction only, but it happens to embrace Bunker Hill within its limits, and the appointment is further significant from the fact that he is said to be the first one of the race who has ever held a judicial office in this country.

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Apropos of the colored man, the recent decision of the Supreme Court upon the Civil Rights Bill might have been deduced as a necessary conclusion from the proposition laid down by them in Virginia v. Rives, 100 U. S., 318, where they say that the XIV amendment "has reference to State action ex-

clusively, and not to any action of private individuals." In the Civil Rights cases it was alleged that the defendant railroad company had denied plaintiff equal privileges with other passengers in its cars. But it was not alleged that any statute of the State authorized the company to make such distinctions. Besides this, Judge Emmons, in 2 Am. L. T. Rep. (N. S.), 198, and Judge Cooley, in his Torts, 384, 386, and Judge Barr in Smoot v. Kentucky Central Railroad Co. (referred to ante, page 263), had all anticipated the Supreme Court.

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A devise was recently made in Iowa to a charitable institution, and the witness to the will being an incorporator of the institution, she was objected to as incompetent on the score of interest, for it was said that upon the dissolution of the corporation she might be entitled to some part of its assets, but the court held such an interest was too uncertain and contingent to disqualify a witness. It depended upon whether the witness survived the corporation, or, if she did, whether it left assets; and if it did, whether those assets went to its successor or not. (Quinn v. Shields, Ia. Sup. Ct., Dec., 1883.)

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In Ohio, during the past six months, out of 159 applicants for admission to the bar sixty were rejected or nearly 75 per centum. There the system of complimentary admissions has been abolished and the power given to the Supreme Court to appoint a committee by which all applicants from all parts of the State are examined. In this way a uniform standard of admission is secured. The legislature should adopt a similar law for this State.

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In Trussell v. Scarlett (U. S. Cir. Ct., Md., Nov., 1883) it is held that where a mercantile agency makes a communication to one of its subscribers, who has no interest in knowing it, concerning the financial condition of another person, in good faith and under circumstances of reasonable caution as to its being confidential, it is a privileged communication, and an

action for libel can not be founded upon it even through the information given thereby was not true in fact, and though the words were themselves libelous. The contrary was held in Beardsley v. Tappan, 5 Blatchf., 497. (Sunderlin v. Bradstreet, 46 N. Y., 188; State v. Lonsdale, 48 Wis., 348.)

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The U. S. Sup. Ct. holds that while a State statute giving the right of redemption, first, to the mortgagor, then to the judgment creditor, is a rule of property obligatory upon the Federal courts, it is competent for the latter, by rules, to prescribe the mode in which redemption from sales under their own decrees may be effected, as that the redemption money shall be paid to the clerk of the court and not to the officer holding the execution, as required by the State statute. (Life Ins. Co. v. Cushman, &c.)

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In U. S. v. Sou. Col. Coal, &c., Co. (U. S. Cir. Ct., Col., Nov., 1883) it is held that when the government becomes a party to a suit in its own courts, it stands on the same footing as an individual, and must submit to the law as administered between man and man, yet there is this limitation upon the rule that neither the statute of limitation nor laches can be pleaded against the United States. (U. S. v. Beebee, 4 McCrary, 12.)

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A statute of Wisconsin requires all persons having claims against the estate of deceased persons to prove them before the county court within a certain time after notice given, and upon failure to do so bars the claimant of all right of action. In Hartman v. Fishbeck (U. S. Cir. Ct., Wis., Nov., 1883) plaintiff, a citizen of Missouri, brought suit in the U. S. Court, in Wisconsin, upon a claim due him by defendant's intestate, defendant being a citizen of Wisconsin. Defendant relied on the above statute. But the court held that it is the constitutional right of a citizen of another State, where his demand is adequate in amount and other prerequisites to jurisdiction

exist to sue in this court, and that right can not be affected by State statute. In other words, the law of a State limiting the remedies of its citizens in its own courts can not be applied to prevent the citizens of other States from suing in the courts of the United States in that State for the recovery of any money or property there to which they may be legally or equitably entitled (Suydam v. Broadnax, 14 Pet., 67). But it is also probably true that if a citizen of another State, in a case like this, invokes the aid of the State court in the enforcement of a remedy, he will be remitted to the court having special and exclusive jurisdiction of the subject matter and be held subject to the provisions of the statute referred to (Commercial Bank, &c. v. Slater, 21 Minn., 174). The U. S. Court recognize the statutes of limitation of the State (McClung v. Silliman, 3 Pet., 270), but this statute is not like a general statute of limitation. In Kentucky there is a statute similar to that of Wisconsin, for by section 33, Civil Code, creditors who do not prove their claims before the commissioner in chancery within a prescribed time are barred of any action against the personal representative.

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The State Bar Association of Illinois is to hold its annual meeting on the 3d and 4th of January, 1884; that of Ohio during the last days of this month. As has been before suggested in the Reporter and Journal, the Association of this State would increase its attendance if its meetings were held during Christmas week instead of in June. In that month some of the courts are sitting and all lawyers can not leave home, but during Christmas week not a court in the Commonwealth is in session. Besides, June is the period for holding political conventions, and lawyers who are once absent at those conventions can not get off so soon afterwards for another trip. The Illinois Association follows up its banquet with a dance, but the dance does not seem necessary to the full enjoyment of the occasion, and we need not imitate them in that.

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A new interpretation has recently been given to contracts of insurance in benevolent companies by the decision of the Sup.

Ct. of Minnesota, in Nerskin v. Northwestern, &c., Association. Plaintiff held a certificate of membership in this association which contained this clause: that he, "having complied with the conditions of membership, is entitled to the benefit of said association (subject to the conditions hereinafter named) in the sum of one dollar for each contributory member, not exceeding $2,000." The association contended that it was not to pay absolutely, but it was bound only to make the assessment against each member and when collected to pay the proceeds over to plaintiff. But the court held that the company was bound to pay the amount whether the members settled up or not. If they paid up, it was well; but if not, the company must pay nevertheless.

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In a case recently tried in Louisville between two Chinamen, the parties were sworn after the true Mongolian fashion, i. e., the interpreter required each witness to cut off the head of a chicken and as he did so to repeat a certain formula of words. If he spoke false after this the witness believed that he would fall into a thousand pieces on the witness stand. Another mode mentioned in the books of swearing a Chinaman is by requiring him to break a saucer (1 Car and M., 248). A Gentoo is sworn by touching with his hand the foot of one of his priests.

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The owner of lands in improving them and applying them to the purposes for which such lands are ordinarily used may raise the surface, if necessary, even though as an incident to it the rain and snow waters falling on it are diffused over adjoining lands to their damage; but one land owner has no right, independently as an express grant, to gather the surface waters on his lands and, by means of ditches, cause them to flow upon the land of another, where they would not otherwise go. (Hoganon v. St. Paul, &c., Ry. Co., Minn. Sup. Ct., Nov., 1883.)

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At the common law an innkeeper is responsible for the loss in his inn of the goods of a guest unless the loss was occasioned

by the negligence of the guest, the act of God or the public enemy. And the fact that the loss was occasioned by anyone of these causes must be made to appear affirmatively. It is not sufficient to show negligence on the part of the guest, to prove that with his own consent he slept in the same room in the inn with a stranger, who stole the goods, and such facts will not exonerate the innkeeper. (Olsen v. Crossman, Minn. Sup. Ct., Nov. 17, 1883.)

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The Sup. Ct. of South Carolina, in Holmes, &c. v. National Bank; holds that an action might be maintained in that State against a national bank established in another State, and that there is nothing in the acts of congress relating to these banks that prevents an attachment from issuing in such an action before judgment. Upon the question where these banks must be sued there is wide difference of opinion. Thus in Crocker v. Marine Nat. Bank, &c., 10 Mass., 240, it is held that by force of the act of congress such banks can be sued only in the county or city where the bank is established; but in Cooke v. State Nat. Bank, &c., 52 N. Y., 97, it is held that an intent to take away jurisdiction from the State courts should not be deduced from the doubtful and ambiguous language used in the act of congress. It is said that the U. S. Sup. Ct. has not squarely decided the question, although it approaches it in Casey v. Adams, 12 Otto, 66, and in Van Allen v. Assessors, 3 Wall., 589, the character and purposes of the national banking act are discussed by C. J. Chase, who took a prominent part in drawing it and afterwards in construing it.

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The following very interesting account of the manner in which the Supreme Court of Iowa does its work is copied from an exchange, the American Law Review:

"All cases are submitted 'in print,' i. e., ten printed copies of each abstract and argument are filed with the clerk, oral arguments in addition thereto being optional with counsel, and, by the way, rarely indulged in. Cases are assigned for

writing the opinion by rotation immediately upon their being submitted. No consultation is held by the judges upon any case at the term at which it is submitted. Each judge carries to his home complete printed copies of each of the cases filed with the clerk during the term. These he reads during vacation, and writes a brief synopsis of his views of each case, which he forwards to the judge to whom the case was assigned. After having thus finished the cases assigned to his associates, he commences upon those assigned to himself, upon which he has in the meantime received a synopsis of the views of each of the other judges. From these and his own he prepares an opinion, which is submitted to the full bench at the next term. If then approved by all, it becomes the opinion of the court. By this means the State gets the benefit of the individual opinion of each of the five judges, arrived at upon a careful reading of the case, separate and apart from his associates. As six terms of court are held each year the delay caused by the invariable continuance of the case is more fancied than real. Difficult cases, where unanimity is at all probable, or unusually desirable, are sometimes held by the court over several terms."

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The Supreme Court of Massachusetts has recently held in ex parte Kennedy that a convict who is pardoned on condition that he do a certain thing thereafter (i. e., upon a condition subsequent), if such condition is not observed by him, he may be rearrested and imprisoned by order of the governor, and may be made to serve out his former sentence, and, that too, without any further judicial ascertainment of the fact that he has not observed the condition. The question arose on habeas corpus.

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A creditor enticed his debtor across the line from Canada into Vermont and there had him arrested under the law of that State, for not paying the debt. It is held that the debtor was entitled to recover in an action for false imprisonment (Woodart v. Butterfield, 6 Montreal Leg. News, 228). In this State a similar question arose in Wood v. Wood, 78 Ky., 624.

A suit was lately brought against the city of Evansville because of the negligence of its fire department whereby the property of the plaintiff was destroyed. It appeared that the particular negligence complained of was the use of a balky horse attached to the hose carriage and the drinking and carousing of the members of the department. The text-books lay down the following distinction upon the subject of the liability of a municipal corporation for the acts and defaults of its servants. In the exercise of private franchises which are often bestowed upon municipal corporations, they are liable, like other individuals, for the acts and defaults of their servants, even though not appointed by themselves. But whilst it is administering the discretionary powers of government belonging to it, such a corporation enjoys the exemption of government from responsibility for its own acts and the acts of its corporate officers. Hence it is liable for any defaults of its officers in the management of a smallpox hospital established by the city; or for not removing osbtructions from streets (at least it was so at common law). But on the other hand it is liable for the neglect of its agents in connection with gas works or bridges. The case of Robinson v. City of Evansville, 87 Ind., 334, supra, seems to consider the working of the fire department as a governmental function and not a private franchise, and, therefore, the city is held not answerable for its agent's neglect. In Kentucky this question was passed on in Greenwood v. Louisville, 13 Bush, 226, where it was held that plaintiff could not recover of the city for personal injuries received by her through the fast and dangerous driving of an engine in going to a fire, the city being required by law to establish and maintain a fire department. And in Patch v. Commonwealth, 17 B. Monroe, 728, a city is not responsible to the owner of property consumed by fire on the ground that it failed to keep cisterns filled with water and fire hooks, etc., whereby the fire might have been extinguished.

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Judge Krekel, of the U. S. Cir. Ct., in Missouri, recently imposed a very enlightened but strange sentence in a case which came up before him. A young man named Hannah was arraigned for selling liquor to the Indians. He pleaded guilty,

but mentioned his ignorance of the law as an excuse and in palliation. He was young and bright and awakened an interest in the judge who gave him some good advice, and among other things enjoined him to learn to write. Hannah was doubtful of his ability to master so great an art, but the judge was confident that he could, and in order to make the experiment he sentenced him to the county jail until he should be able to write a letter, and calling up a man named Martin who had already been convicted of some minor offense and was awaiting sentence, he consigned him also to the county jail until he should have taught Hannah to write. The two went off and in about three weeks they appeared in court asking their discharge and tendering a letter which Hannah had written and which showed that he had developed in that short period into a very fair penman. It would be well if all sentences might be used in this way not merely to punish but to educate or reform the offender.

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## III.

## THE LAST YEAR'S WORK IN THE COURT OF APPEALS.

VOLUME FOUR KENTUCKY LAW REPORTER AND JOURNAL.

The following cases were decided between April and June:

Avery, &c. v. Meikle, &c., 759, establishes a very important principle. The opinion is lengthy but very readable. The point involved, when briefly stated, seems to amount to this, that where A manufactures certain goods and uses particular signs and symbols to indicate himself as the manufacturer and to show the size and quality of the goods, B can not use the same signs and symbols on his own manufactures to mislead the public into the belief that they are the goods of A, even though the signs and symbols used were not entitled to be protected as a trade-mark. It was argued for B that the signs and symbols were very apt for the purpose of marking size and quality, and that he copied them for that purpose alone, but the court held that the extent to which they were copied showed an ulterior design of passing his goods off to

the public as A's. The opinion has met with some criticism, but it seems correct, and it does not appear how courts of equity can do less in protecting a trade reputation built up through the industry of a manufacturer and enjoyed through the medium of signs and letters identifying his goods, unless indeed protection is to be refused to all signs that do not amount to technical trade-marks. In Carpenter's Ex'ors v. Kearns, 825, it is held that where a vendor waives his lien upon the land for the purpose of enabling the vendee to raise money on a mortgage, he may still assert it as against the vendee or his widow, and exclude them from the homestead. In Belew v. Belew, &c., page 826, where a vendee has sold the land before vendor sues to enforce the lien, the purchaser is a necessary party to the suit, and vendor obtaining judgment without making him a party can not enforce it by a writ of possession against the purchaser; if he does, both he and the sheriff are liable as trespassers. Carter, &c. v. Drewery, &c., 888, holds that the wages of a married woman are her own, and when invested in a homestead can not be taken to pay the debts of her husband. In Speers v. Reed, page 894, it is held that in general the wife is entitled to the equity of a settlement out of the property which she brings her husband, but if he has reduced it to possession and his creditors have acquired a lien upon it, by attachment or otherwise, her equity will not be regarded until these liens are satisfied. In Thompson v. McCloskey, &c., page 899, it is held that a wife may have a separate estate in a remainder, e. g., where the husband conveyed land to a trustee to the separate use of the wife, but reserved to himself the rents and profits during his life. The wife could dispose of the remainder, as separate estate, by will. Compare Duke's Heirs v. Duke's Devisees, ante, page 347 (of volume five), where a wife was given a separate estate in a remainder, to take effect in the event she married again, and it was held that during her existing marriage she held the remainder as general estate only, and had no right to dispose of it by will. In Demint v. Riggs, &c., page 899, it is held that where several own a chattel (e. g., a barn house) in common, it may be sold upon petition of anyone of the owners and the proceeds be divided among all. But it is error to decree the sale of the share of any owner; when a sale is

made the entire interest, or, in other words, the chattel itself, must be sold. Yet so little advance had equity made in the time of Lord Eldon that when he was petitioned by one of several joint owners for a division of the property, he said he had no jurisdiction to make a sale, but could only divide the thing held in common (which was a house), and he accordingly allotted a lower room and the hall to one; an upper room and the stairway to another; a back room and the back stairway to a third, etc. The power now vested in courts of equity to sell and divide the proceeds avoids such absurdities. In McGill, &c. v. Mercantile, &c., Co., 927, it is said that although a wife can not mortgage her separate estate for her husband's debt, she may for her own.

There are two important decisions upon the sale of infants' real estate. In one, Kendall v. Briggs, page 854, the suit was brought under Civil Code, section 490, which provides that where the property (of an infant) is indivisible, equity may decree a sale. In this case the court held that the bond required by a subsequent section (493) was not necessary. But in Barnett v. Bull, page 940, where the action was under section 491, to sell the infants' real estate in remainder and reinvest the proceeds, it is held that failure to give the bond makes the sale absolutely void. In Hazlip v. Austill, page 982, it is said that where a vendor failed to comply with his contract to dig vendee a well upon the land, the true measure of damages is the cost to vendee of water elsewhere and not the inconvenience or suffering from want of water right at hand in the well. In regard to partnership property Ellis v. Johnson, page 991, holds that as a partnership is dissolved by the death of a partner, the creditors who are such at that time are to be first paid, and before those who became such while the business was being continued in compliance with the will of deceased. But if the funds of his cestui que trust have been invested in the partnership by the partner who was also a trustee, the cestui que trust is to be paid out of those funds before any of the creditors. In Husbands v. Paducah, page 992, it is held that a sale of real estate for city taxes when the taxpayer has sufficient personalty is not void. Nor is a vendor's lien superior to the tax lien, although the latter was created by a statute passed after the vendor's lien arose. And this brings us to the end of the volume.

## KENTUCKY COURT OF APPEALS.

## THE RAILROAD TAX CASES v. THE COMMONWEALTH.

(Filed December 15, 1883.)

1. Taxation—Railroads—Mode of assessment—The individual citizen of the State having the right to appeal to the county and circuit court from the action of the board which fixes the valuation at which his property shall be taxed, the appellants, the railroad companies, complain because they are not allowed an appeal from a similar board which assesses their property. Held—The legislature may grant this right to the individual and withhold it from a railroad, since the latter must be assessed in a manner peculiar to itself; passing through different counties, it can not be subjected to the action of the different county authorities without producing inequality in the assessments, therefore, a central board, acting for the whole State, is appointed for the benefit of the roads, and if the rate levied by that board is uniform with that imposed on the citizen generally, the railroads can not complain of a difference in the mere mode of assessment, which, though it denies them the appeal, is beneficial to them because it makes taxation uniform.

2. Taxation a legislative, not judicial question—The mode of taxation is entirely under the control of the legislature; it may make the action of such boards final and conclusive without being guilty of any infraction of the constitutional provision that no man shall be deprived of his property except by the law of the land, since it has never been established that taxes are to be collected by judicial process. The efficiency of government requires that they should be summarily enforced.

3. Notice—The act which created the board of assessors for the railroads fixing the time and place of its meetings was sufficient notice to the roads to enable the board to act. But the taxpayer is not entitled as a constitutional right to notice before his property can be assessed for taxation.

4. The board of railroad commissioners in this State are merely authorized to assess the roads for taxation generally and to ascertain the tax due the State, but they have no power to enforce its payment. That power is vested in the Franklin Circuit Court exclusively.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The Cincinnati, New Orleans & Texas Pacific, the Chesapeake, Ohio & Southwestern, and the Louisville & Nashville Railway Companies are in this court as appellants, complaining of a judgment rendered by the Franklin Circuit Court against them in favor of the State for taxes alleged to be due and unpaid for the year 1882. The proceeding is by an ordinary action authorized by the provisions of the act of April, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation,

and for taxing the same." The appellants in their answer below insist that the mode of assessment or valuation of railroad property for taxation, as prescribed by the State, is in direct conflict with the Constitution of the United States and the Constitution of this State, and, therefore, the proceeding below should have been dismissed.

In order to a correct understanding of the issue made between the State and the appellants it is proper to notice the several legislative enactments under which the taxation in this case was imposed, and to review briefly the past legislation of the State with reference to the manner of assessing the property of such corporations. By the provisions of the first section of the act of April 3, 1878, the president or chief officer of each railroad company is required in the month of July in each year to return to the auditor of public accounts, under oath, the total length of such railroad, etc., with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines, cars, and a list of depot grounds and improvements and other real estate of the company, and the value thereof. By the third section the governor is required to appoint three disinterested freeholders, citizens of the State, who shall constitute a board of equalization, who shall meet annually at the office of the auditor in Frankfort, on the first day of September in each year, a majority present constituting a quorum for the transaction of business, and at said meeting the auditor shall lay before them the returns made to him under this act, and should the valuation on any of them in the judgment of the board be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. It is further provided that their service shall not be for a longer period of time than twenty days in any one year. By section 4 "the same rate of taxation for State purposes which is or may be in any year levied on other real estate in the Commonwealth shall be, and is hereby, levied upon the value so found by the said board, of the railroad, rolling stock and real estate of each company. When the valuations are complete, notice is given by the auditor to each railroad company of the amount of its assessment for taxation for State purposes, etc., and the taxes are required

to be paid on or before the 10th of October in each year, and upon default made the taxes in behalf of the Commonwealth may be recovered by action in the Franklin Circuit Court.

The act of April 3, 1878, was amended by an act approved April 19, 1882, by which the board of railroad commissioners appointed under the provisions of an act approved April 6, 1882, were required "to perform all the powers and duties conferred upon the board of equalization by the act to which this is an amendment." This last enactment substituted the railroad commissioners as the board in room of the freeholders to be appointed by the governor, whose duty it was by the act of April 3, 1878, when valuations placed on railroad property were too high or too low, to correct and equalize the same by a proper increase or a decrease thereof. The act creating the board of railroad commissioners is entitled "An act to prevent extortion and discriminations in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners, and define its powers and duties." The purpose of that act seems to have been to invest the board with a supervisory power over railroad companies so as to regulate and prevent improper charges for carrying freight and passengers, and to subject such companies, upon information made, to certain penalties when guilty of extortion. The provisions of the nineteenth section of this act would conduce to the conclusion that the legislature intended to confer upon this board judicial power in authorizing them to hear complaints and render judgments in cases where railroad companies have violated the provisions of the first and second sections of the enactment, but a careful consideration of the act will show an intention to give to the circuit court exclusive jurisdiction to enforce the fines and penalties imposed, and no other jurisdiction is conferred. The award of the board of commissioners, if such power is given by the nineteenth section, is but the basis of a prosecution to be instituted in a tribunal having jurisdiction of the subject-matter. The commissioners under the act in question constitute a mere advisory board, without any power except to receive reports from railroad companies in the manner prescribed by the act, and so hear complaints and give information when, in

their opinion, the railroad companies, or any of them, have violated the law.

They may suggest the mischief, but are powerless to afford a remedy except by information to some other tribunal. If the power to render an award should exist, we perceive no reason why under the enactment they could not assess the property of the corporations and exercise such ministerial duties as is required of them by the act of April 3, 1878, and its amendments, and the act of April 6, 1882. The act of valuation is in its character judicial, but the general duties of this board are ministerial, and for the exercise of such duties the board was organized; and while the law creating it is in many respects imperfect, the court may disregard the twenty-ninth section of the act of April 6, 1882, leaving the board to discharge all other duties imposed by the act, and thus obviate the objection made by counsel that the act of April 6, 1882, is in violation of section 2 of article 1 of the State Constitution, providing that "no person or collection of persons belonging to one of these departments (legislative, executive and judicial) shall exercise any power properly belonging to either of the others except in the instance hereinafter expressly permitted." The appellants in this case in the year 1882 made returns to the auditor as required by the provisions of the act of April 3, 1878, stating under oath what they regarded as a fair valuation of their roads for the purposes of taxation. The board of commissioners, as is alleged, increased this valuation, and for that reason appellants declined to pay the tax imposed, and for these taxes the judgment below was obtained. Two of the appellants paid to the auditor the amount of the taxes due upon the valuation as fixed by the chief officer of each corporation, but the Cincinnati, New Orleans & Pacific Railway Co. declined to make any payment, in order, as they now state, that it might be heard upon the constitutional questions involved.

It is alleged in the petition by the State that the appellants were present and heard by the board of commissioners upon the question of valuation, nor do we understand that appellants are complaining so much of the valuation placed upon their respective roads as of what they designate the arbitrary power conferred upon the board by the act in question. They main-

tain that under the enactment the hearing before the commissioners was a matter of favor only and not of right and that this case should be considered as if the valuation had been increased or fixed by the board without the presence of any of the officers of the corporations, and without express notice of the purpose of the board to increase the value of the railroad property, and in this light it is perhaps proper to consider the question that the rights of these parties may be finally determined.

It is maintained by the appellant that the legislature of the State has no power to provide any mode for taxing railroads which will deprive them of the same remedies that other taxpayers have against arbitrary assessments, or which will make the property of such corporations contribute more than their just and equitable share of the burden of taxation.

Before proceeding to the consideration of the principal question involved, it will be necessary to notice the present mode of assessment, with the remedies afforded the citizen for decreasing the valuation of his property when the estimate placed upon it by the assessor exceeds its value. The right of the citizen to a hearing when his property has been assessed for the purposes of State revenue has been seldom embodied in our system of taxation, and for the greater period of time during the existence of the State government there was no remedy afforded but that of legislative interference, where the only ground of complaint was that his property had been assessed for more than its value. From the year 1873 to the year 1878 no appeal was allowed from the action of the assessor to any tribunals for the purpose of hearing such complaints, and we are not aware of any question made as to the constitutionality of such a revenue law. The doctrine "that the mode of levying, as well as the right of imposing, taxes is completely and exclusively within the power of the legislature," has always been adhered to by the courts of this State, for the palpable reason as stated by Mr. Justice Cooley in his work on "Constitutional Limitations." There is no reason for the supposition that in a matter of this public importance, where promptitude in collection is always desirable and often im-

perative, dilatory proceedings of this nature (through the forms of process and a jury trial) were within the contemplation of the people when consenting to any general provision of the Constitution.

The very existence of the government depends upon this summary mode of collecting its revenue, and the delay occasioned by appeals to the judicial tribunals of the State upon the mere question as to the value of the property, while it might in some instances relieve the citizen, would conduce to destroy the government by taking from it that attribute of sovereignty without which it can not exist. As said by the Supreme Court in the case of Providence Bank v. Billings, 4 Peters, 514: "The interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security, where there in no express contract, against unjust and excessive taxation as well as against unwise legislation generally;" and in the case of St. Louis v. The Ferry Co., 11 Wallace, 423, the same court said: "It has been said that the power of taxation for the purposes of the Commonwealth is a part of all governmental sovereignty, and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportions and by what process and instrumentalities taxes shall be assessed and collected." In the case of a State tax imposed on foreign held bonds, 15 Wallace, 319, it is further said: "Unless restrained by the provisions of the Federal Constitution the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." And in the case of Kirkland v. Hotchkiss, 10 Otto, 491, the same general principle is again recognized.

The abuse of this power by the State was never held as sufficient to warrant interference by the Federal judiciary. While this power as to the mode and amount of taxation is to be exercised alone by the legislature, and no attribute of sovereignty is more pervading," the legislative department of the government is not clothed with the power of confiscating the property of the citizen under the guise of taxation. Certain elements, says Mr. Justice Cooley, are essential in all taxation. "It does not necessarily follow, because the power is so vast

that everything which may be done under pretense of its exercise will leave the citizen without redress even (if) there be no conflict with any express constitutional inhibition. Absolute, arbitrary power over the liberty and property of the citizen exists nowhere in a republic, not even in the largest majority." (Bill of Rights, section 2.)

The legislature has no such power as to discriminate between the citizens by making one or more assume the entire burden of taxation and exempt the others. Approximate equality in distributing the burden and uniformity in the mode of assessment is the cardinal rule, and, as said by this court in the case of the city of Lexington v. McQuillan's Heirs, 9 Dana, 513, "that while taxation may not be universal, it must be general and uniform." Equality, such as is practicable, is essential to the constitutionality of taxation, and the only exception is found in cases of local taxation where the special benefits authorize the imposition of the burden upon those who derive the benefits. From the case of the City of Lexington v. McQuillan's Heirs, supra, decided in the year 1840, and the intermediate cases, including the case of Preston v. Roberts, decided at the January term, 1877, 12 Bush, 570, this court has held the rule as to uniformity and equality to be fundamental, and gone as far perhaps as the courts of any State in the Union in protecting the citizen against oppressive and arbitrary taxation. "That there shall be equality as far as reasonably practicable in the distribution of public burdens, whether local or general, is a cardinal principle in the law of taxation, and flagrant departure from that rule ought not to be allowed unless a more equal distribution under the circumstances is unattainable" (Preston v. Roberts, supra). Whether this cardinal rule has been violated we shall now proceed to inquire.

Under the general law for assessing property, real and personal, in this State for taxation, the owner is required to list it under oath with the assessor, and after this has been done the assessor, upon his own knowledge and other evidence, fixes a full and fair valuation on the property (Sections 11, 13 and 16 of article 5, chapter 92, General Statutes). By article 6 of the same chapter a board of supervisors, consisting

of three taxpayers, citizens, is appointed by the county court with the power to correct any errors committed by the assessor, whether in fact or in relation to the valuation of the property listed, and when the property has not been correctly valued to fix a proper value on the same" (Section 6 of article 6). By an act approved April 2, 1878, this last act was so amended as to prevent the board from changing the value of the property as fixed by the assessor without giving notice to the owner, to be served by any officer authorized by law to serve a summons. The party aggrieved may, if the board decides against him, appeal to the county judge, and if over $50, may appeal from the decision of the county judge to the circuit court.

The legislature having seen proper to submit this question of valuation, at the instance of the citizen, to the courts of the State, and not leaving it with the revisory board, being merely a question of policy, no necessity exists for inquiring into the expediency of the measure, as in either case, after the property had been assessed, the increase in valuation is not to be made without a hearing by the party whose rights are to be affected by the decision of the board. These appellants, the railroad companies, say that the remedy afforded the citizen under the general law is not only withheld from them, but they are denied the right to a hearing before the tribunal, board of commissioners, whose judgment becomes final as to the question of valuation. The board of railroad commissioners are required to meet annually at the office of the auditor, in Frankfort, on the 1st day of September in each year, for the purpose of correcting and equalizing the value of the property of these corporations, and the same rate of taxation for State purposes which is or may be in any year levied on other real estate in this Commonwealth shall be levied on the value so found by the board. A railroad must necessarily be regarded as a unit, and, as this court has determined, by reason of legislative authority, must be taxed as such. Its rolling stock can not be seized and subjected for taxes assessed for municipal purposes, nor are the railroads listed by the assessors of the counties through which they may pass for taxation. All of the locomotives, cars, etc., are treated as fixtures, and there is

no better or more practical mode of assessing such property than to treat the whole as real estate.

The principal object of the legislature in having this board of commissioners to assess and supervise the taxing of such companies was that no injustice might be done the companies by subjecting their property to fragmentary assessments, subject to the revision of the supervising boards of each county through which the roads might run. Fragmentary taxation of the same line of road by a dozen or more different assessors would scarcely produce that uniformity in assessment so absolutely essential to produce equality in taxation, and the legislative purpose was to obviate such an objection, and have a uniform assessment of this property, and no wiser suggestion could have been well made than to place the valuation in the hands of a board of intelligent freeholders, to be selected by the executive of the State, thus removing the question of value from local influences and prejudices that often result in imposing upon such corporations oppressive burdens.

These corporations should contribute their just proportion of the public burden, and no more. They have not been taxed on their property in a greater sum than any other owner of real estate, and when enjoying greater rights and privileges in the use of their property than ordinarily pertains to the individual owner of real estate, they should not complain of the mode of assessment that must, in its results, produce equality in the distribution of the tax. While these companies may not have the right to appear before the county board of each county, they have had the valuation of their property fixed by the railroad commissioners, and are not even complaining now that the valuation is too high. The classification of property in this State for the purpose of taxation has been the subject of much legislation.

Corporations, such as banks, insurance companies, express companies and railroad companies, have been required to list or have their property assessed in a different mode than that prescribed by the general law. Specific taxation is the rule with reference to corporations of one class, and a mode different from the general law designated in determining the value of other corporate property. The constitutionality of such

legislation is now being questioned, when no discrimination is made to appear, and no greater burden imposed on the property of appellants than upon the other property of the State, whether belonging to individuals or corporations. When the citizen is permitted to leave the board of supervisors and go by an appeal to the circuit court to have his tax decreased there arises a much more serious constitutional question than is presented in this case. The imposition of taxes is not a judicial function, still under the statute of this State the courts of the State are required to hear complaints as to the valuation of property by the revisory board, and to fix the value of the property to be taxed, or direct the board from which the appeal emanates to enter the opinion of the court as to the amount for which the citizen should be taxed. The chancellor and common law judge should hesitate before converting themselves into tax gatherers or assessors, although the ascertainment of value may be in the nature of a judicial finding. It is only a question with the legislature whether the property of such corporations shall be assessed by the railroad commissioners, whose judgment shall be final, or subject their property to assessment by the county supervisors or the county judge. This question has in effect been decided by the Supreme Court of the United States in an appeal from the Supreme Court of Illinois, in an opinion rendered by Mr. Justice Miller, in what is known as the "State Railroad Tax Cases," 2 Otto, 575. It was alleged in one of those cases that the value of the railroad track, as returned by the chief officer of the company to the county clerk and auditor, was $648,436.41, and that the State board of equalization had assessed the value of the railroad track at $1,629,556; that the aggregate value of the rolling stock, as returned to the auditor, was $338,039, and the aggregate value as fixed by the board of equalization was $1,000,110. It was further alleged that the assessments had been made without notice to the railway company.

The law in regard to the assessment of railroad property in the State of Illinois is very similar to that in existence in this State, the principal difference being that the movable property of such corporations is deemed personalty. The State, county and city taxes are collected on the assessment made by

the board of equalization. It has larger power than is confided to the railroad board of commissioners in this State. The taxpayer in the State of Illinois, as in this State, must have notice before his property is increased in its value by the town or county supervisors, while the valuation of the corporate property may be increased by the State board without actual notice. It is true the State board may increase the valuation of the property of any citizen in the same way, but this does not deprive him of the right to notice, when the county or township surpervisors undertake to increase the value. This action of the county or town supervising board may, and doubtless does, control the action of the board of equalization. The citizen has the benefit of the action of the county boards, and corporations submit alone to the action of the State board, so there is but little, if any, difference in the questions involved in those cases and the one being considered. It is argued, however, that the Constitution of the State of Illinois expressly confers upon the general assembly the power "to tax persons or corporations owing or using franchises and privileges in such manner as it shall from time to time direct by general law, uniformly as to the class upon which it operates." This provision of the Illinois Constitution, although not found in the Constitution of this State, is but the recognition of a power that exists with the legislature in the absence of a constitutional provision. It is not necessary or even practicable that the mode of assessing and taxing property shall be uniform, but all property or kinds of property must be taxed equally and at a uniform rate. The mode of assessing the property of a railroad can not well be similar to the general mode of assessment; and if the mode adopted does not make corporate property contribute more than its just share of the burden the proceeding is not open to constitutional objection on that ground. One county assessor would have the same right to assess that another would, where the road ran through the county of each, and, therefore, the necessity of resorting to some other instrumentality for the purpose of fixing the value. It is further maintained by counsel for the appellants that the denial to these companies of the right to be heard, or the absence of an express provision in the act requiring notice to be given of the proceedings of the board,

renders the assessment void. This incidental question was decided in the tax cases referred to, where the board had increased the assessment or value fixed by the local board or chief officer of the railroad company, in the absence of any notice required by the act, and upon the allegation that no notice had been given. We are aware that in those cases the appellants were seeking an injunction against the collection of the tax, and the difference existing between that class of cases and those where the State undertakes, by an action in a court of law authorized by statute, to enforce payment of the tax, a defense would be permitted to be made to the action at law that would not authorize the granting of an injunction by a court of equity. This rule can not affect the constitutional question.

It is urged that the assessment is in violation of the Federal Constitution, and if so it was void and should have been so held by the chancellor. In response to that argument Mr. Justice Miller, speaking for the court, said: "It is hard to believe that such a proposition can be seriously made, because if void as to the railroad companies it must be equally void as to every other owner of property in the State. If the corporation is entitled to notice, every individual is equally entitled to it. The board had its time of sitting fixed by law; its sessions are not secret; no obstruction exists to the appearance of anyone before it to assert a right or redress a wrong." The appellants urge that notice is indispensable, and, as said by the learned judge, if so, it must be void as to all. But it is said that the board of commissioners in this State have no supervisory power over any property but that of railroad property, and, therefore, the cases referred to have no application. This can make no difference; if actual notice is required before an assessment can be made, or an opportunity to be heard after the assessment has been made, the cases are identical so far as affects the constitutionality of the act. The opinion in the tax cases of the county of Santa Clara and others against various railroad companies delivered by Mr. Justice Field in the ninth circuit district of California has been referred to in support of the position assumed by appellants. We do not understand that such a question was involved in the consideration of those

cases. It was held in the opinion in those cases that until the adoption of the fourteenth amendment there was no restraint to be found in the Constitution of the United States against the exercise of the taxing power of the States, but that the first section of the fourteenth amendment, declaring that "no State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," prohibits the imposition of unequal burdens by the State, and, therefore, gives to the Federal judiciary jurisdiction over such questions. Whether or not this is a proper construction of the amendment is a question not before us, and in regard to which we express no opinions.

Unjust discrimination in imposing taxation, where irregularity is necessarily produced, has never met the approval of this court, but, on the contrary, has always been held to be unconstitutional, but we are not prepared to say that the ordinary mode of assessing property is invalid for the want of actual notice to the owner. The assessment is made by the assessor on the oath of the owner and other evidence, and because the owner has no appeal or revisory board to revise the assessment affords no constitutional objection to the law. Section 12 of the Bill of Rights provides "that no one can be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land." The words "law of the land" are equivalent to due process of law, and mean the right to be heard for the preservation and protection of life, liberty and property, but it was never supposed that this provision of the Bill of Rights applied to the exercise of sovereignty in imposing taxes for the preservation and maintenance of the government other than the right of the assessor to value the property upon the oath of the taxpayer and other evidence as provided by the statute; and if dissatisfied with the valuation the owner, in the absence of a provision giving him a further hearing, must look to the legislature for relief, and not to the judicial tribunals of the State. Such has been the uniform construction of the State courts where the term due process of law or its equivalent

is found in State Constitutions, and attempted to be applied to questions affecting State taxation for revenue purposes. The burden of State taxation is made at least to rest upon the shoulders of those whose incomes, while they furnish a comfortable support, seldom result in adding to the capital invested.

They make no complaint of the burden, but capital, at war with taxation when it affects the income or the State imposes what is conceived to be too enormous a burden, is demanding an appeal, either to the revising boards or the judicial tribunals of the State, resulting often in exemption from a just and proper taxation. The hands of the sovereign are tied and the State government on the verge of bankruptcy, while the propriety of the tax is being considered by State and local tribunals. "With regard to the precise mode of exercising the taxing power the legislature, unless restricted by some constitutional provision, seems to be invested with entire discretion" (Hilliard on Taxation. page 3). The Supreme Court of the United States, in the case of Kelly v. Pittsburg, 14 Otto, 78, uses the following language: "The main argument of the plaintiff in error, the only one to which we can listen, is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law. It is not asserted that in the method by which the value of his land was ascertained for the purpose of taxation was any departure from the usual mode of assessment. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure which, in regard to that matter, is, and always has been, due process of law." In High v. Shoemaker, 22 California, 363, the court said: "Universal practice had established at the time our Constitution was adopted that this provision (referring to due process of law) in the Constitution was not understood as applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the government." Again in the State Railroad Tax Case, supra, the court,

alluding to the Federal statute of 1867, prohibiting a suit in any court for the purpose of restraining the assessment or collection of any tax, says: "And though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could in any case interfere with the process of collecting taxes on which the government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice." The mode of assessing and collecting taxes is not in the nature of a judicial proceeding. It is not a judicial inquiry, where parties must have notice and the right to be heard. Revisory boards may be established and appeals allowed by the legislative department of the State, but such modes of relief arise from questions of expediency, but can not be demanded as a constitutional right. Where an assessment has been made in the manner prescribed by the statute, and tribunals are organized with a view of disturbing that assessment by increasing the value of the property taxed, the party affected by it ought to have an opportunity to be heard, and it is in this class of cases where it is asserted that the constitutional right to be heard can not be denied. But even in a revising board with full power to revise the acts of the assessor, it would be impracticable to give such notice as is usual in judicial proceedings before the board can take action. The time and place of meeting having been fixed by law is notice to all, and if the reports of the chief officers of these corporations are to be regarded as an assessment and the commissioners as a board of review, the act provides that they shall assemble at the auditor's office, in Frankfort, on the 1st day of September in each year for the purpose of fixing valuations, and with that view are required to examine the reports made by the officers of the roads. This is notice to the companies, and to require actual notice to every one interested, if this board had supervisory power over all property in the State, it would be altogether impracticable, nor will it answer to say that because

there are only a few lines of railroad within the State, actual notice could be readily given for the court would then be determining the constitutionality of the act by the extent of this supervisory power. As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard, before the board passing on the question of valuation. If actual notice is necessary, and the right to be heard expressly provided for by statute in such cases, then it is immaterial what may have been embodied in the Constitution of the State of Illinois, those cases fall within the prohibition of the fourteenth amendment if the views of counsel prevail as to its construction. The opinion in the tax cases from that State covers the entire ground, and we are not only disposed to follow it because it disposes of the constitutional question, but for the reason that it recognizes and establishes a sound and conservative doctrine with reference to State taxation. It is further argued that, as a board, the commissioners have no power to increase the value of such property, and that their duty on this point is confined to the equalization of the valuation as reported by the various companies. We do not understand the enactment, but, in our opinion, the prime object was to fix the true value and increase each valuation or the aggregate value if, in the opinion of the board, the value was too low. It is in fact an assessing board, and the value fixed by the commissioners must stand.

We find no discrimination made against the corporation in favor of the citizen. The same taxes are paid upon the same values and kinds of property, and we perceive no reason for disturbing the judgment below. The same is now affirmed in each case.

Wm. Lindsay, Holmes Cummins and C. B. Simrall for appellants.

A. Duvall and P. W. Hardin for appellees.

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## PHILLIPS, &c. v. SHIPP, &c.

(Filed November 24, 1883.)

1. **Voluntary conveyance—It is immaterial whether the donee in a voluntary conveyance is a kinsman of the donor or a mere stranger; in neither case, whether kinsman nor stranger, can he claim anything thereunder until all existing debts of the donor have first been paid.**

2. Limitation—General Statutes, chapter 71, article 3, sections. 2 and 6, which provide that an action for relief on the ground of fraud must be brought in five years after discovery of the fraud, but no action shall be brought after ten years from the perpetration of the fraud, apply to constructive as well as actual fraud. And, therefore, where a debtor has made a conveyance in trust for his wife and children, which is afterwards attacked as fraudulent because voluntary, the action can not be maintained if brought ten years after the execution of the deed.

3. Pleading—Limitation—Section 9, which provides that where the defendant by indirect means obstructs the prosecution of the action, the time of the obstruction is no part of the limitation, does not apply where plaintiffs allege merely in general terms that defendants prevented them from obtaining judgment without stating the indirect means by which judgment was delayed.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

The important and controlling question to be determined in this case is whether an action to set aside a deed as fraudulent against antecedent debts because it was voluntary can be maintained against the plea of limitation made more than ten years after execution, delivery and recording of the deed?

Pending a suit begun in 1857, against Thomas L. Phillips, administrator of Samuel Phillips, and his sureties, Murry Phillips being one of the sureties, on the 8th day of February, 1861, in consideration of one dollar, and the further consideration of provision for his wife, America Phillips, and her children, conveyed by deed to John A. Shrader, in trust for their sole use and benefit, the home farm on which Mary Phillips lived, containing 367 acres.

That suit was contested by the administrator and his sureties and was twice in this court upon appeal, each time being reversed. Final judgment was rendered against Mary Phillips and others on the 18th day of November, 1876, for sums in favor of the appellees aggregating $10,114.86. No execution was issued until December 12, 1878, when executions issued and were returned "no property found." On the 21st day of January, 1879, this action was brought against Murry Phillips, his wife and children and their trustee, Shrader, who was also a defendant to the suit referred to, to vacate the deed of February 8, 1861, and subject the land described in it to the payment of the aforesaid judgment. Waiving the question whether the allegations of appellees' petition amount to a charge of act-

ual fraud, and treating it as a suit under the 2d section of article 1, chapter 44, General Statutes, we will proceed to the consideration of a proper and legal answer to the questions of limitation which must settle the legal rights of the parties.

Section 6, article 3, chapter 71, General Statutes, provides: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be decreed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

Section 2, ibid, prescribes that "an action for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued."

These sections relate to the same character of fraud and mistake, and must be construed together in ascertaining the time at which the cause of action accrues, and also the length of time which will bar relief in the two specified states of cases named in section 6 of the statute.

By section 6 discovery of the fraud or mistake is the fact which fixes the accrual of the cause of action, and that accrues when the discovery takes place, or should have taken place, by the use of ordinary diligence. The time of the accrual of the cause of action being prescribed by that section, without fixing any period within which it should be barred, section 2 was adopted to complete the first clause of section 6, and declared the limitation to be five years after the accrual of the cause of action or the discovery, which are one and the same thing.

The legislature knowing that great contentions would arise as to the time of discovery, when limitation should be pleaded, and that old and stale transactions deemed fraudulent or the result of mistake might, therefore, vex the courts long after the facts are presumed to have passed out of memory or beyond the ability of the parties to establish or explain them, prescribe a period within which the discovery and the institution of the action should both occur. The language used for this purpose is plain, direct and forcible. It is this: "But no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

Counsel for appellees affirm that this clause of section 6 refers to actual frauds and not to that class of frauds commonly denominated constructive or legal frauds. And we are presented with a learned philological discussion of its terms, and an array of authorities to prove their position which are quite persuasive, but in view of the manifest intention of the legislature, the previous adjudication of this court, and the reason for a different construction, we are bound to hold that section 6 applies to actual and constructive frauds, both.

In the case of Cotton v. Brown, 3 Ky. Law Rep., 679, this court, by Chief Justice Lewis, said: "Althoughconveyances by a debtor, without consideration therefor, are by the terms of section 2, article 1, chapter 44, General Statutes, declared not fraudulent, but void as to his then existing liabilities, still we are of the opinion they are, in the meaning of the statute, constructively fraudulent, and that the statutory bar of five years provided in section 2, article 3, chapter 71, to an action for relief on the ground of fraud, was intended by the legislature to apply to such cases, as well as those of actual fraud." As we have said, that the bar of five years provided by section 2 of article 3 was evidently adopted to make a complete statute of section 6, it is clear, according to Cotton v. Brown, supra, that the first clause of section 6 refers to both actual and constructive frauds. Not only is the statute (section 2, article 1, chapter 44) susceptible of the construction that it embraces constructive frauds, because the acts described in it are prohibited by the law of that section, but it is based upon the same reason which induced the passage of the statute (13 Elizabeth, chapter 5.)

The object of that statute was "to protect creditors from those frauds which are frequently practiced by debtors * * under the pretense of making suitable provisions for wives, children and other relations" (1 Story Eq. Jur., section 353). Under the construction given to it by the courts voluntary conveyances to strangers were held fraudulent, but conveyances made upon a good or valuable consideration and in good faith were protected. The good faith of such conveyances depended upon the circumstances of the grantor more than anything else. But one statute above named went one step further than that of 13 Elizabeth, and declared all conveyances

without valuable consideration therefor void as to all the debtor's then existing liabilities, thus shutting out the question of good faith in such cases which constitute a fraud in law, or a constructive fraud which is defined to be such "acts or contracts as, although not originating in actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet by their tendency * * to deceive or mislead other persons or violate private confidence deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law." (1 Story Eq. Jur., section 258.)

And we think this class of legal frauds may be multiplied by the legislature to the utmost limit of the mischief where it is the same as result from acts and contracts done malo animo. The principle that every man is bound to be just before he is generous, embodied in our law of descent and distribution, is the underlying stone of our statute which places all volunteers, be they strangers or kindred, on the same footing with reference to pre-existing debts which must be discharged by the grantee, like an heir, before he is entitled to the estate. The legislature in passing the law saw the mischief which grew out of the selection of those whose blood and affection constituted a good consideration, and embraced them as well as mere strangers, and destroyed the temptation to select them as volunteers for a bad or dishonest purpose. It is clear, looking at the reason of the statute and the mischief it was intended to remedy, that it embraces a class of cases which belong strictly to the category of constructive frauds. It follows, therefore, that the limitation provided by section 6 of article 3, chapter 71, General Statutes, applies to this case, and nothing is left us but to enforce the plain provision of the statute, which forbids the bringing of any action for relief, for fraud or mistake, ten years after the time and mistake shall be made or the fraud perpetrated.

There is much more reason in applying the statute to constructive frauds than to actual frauds, for the former are more easily discovered, and are not tainted with the evil which vitiates transactions resulting from the latter. In other words, it is more consonant with honesty to give repose, by statutory limitation, to transactions constructively fraudulent, and deny it to those which are actually fraudulent. And it is not to be

presumed, in face of the equitable doctrine, that limitation only begins to run in favor of actual fraud from its discovery, but in other cases from the transaction, that the legislature intended to wipe out this discrimination, and preferring the evil to the unlawful merely, give a remedy where evil intent and dishonesty prompts the acts for ten years only, yet fix an almost limitless period for legal wrongs, not perhaps evil in themselves or the result of design. Mistake, of course, is less responsible than actual fraud, and it is clearly within the statute, whose words are general in their nature and embrace frauds, as we think, of every species. All the discussion found in Jones v. Read, 1 Humph. (Tenn.), 335; Marr v. Rucker, 1 ibid, 348; Gates v. Andrews, 37 N. Y., 657; Wilson v. Buchanan, 7 Gratt. (Va.), 334, and other cases cited by counsel is based upon wholly different statutes from ours. In the Tennessee cases the limitation by the statute considered in them began to run only after the cause of action accrued. And so with every statute and case examined by us. None of them deny, as ours does, all right of action within a given period after the fraud or mistake, regardless of the time the cause of action accrues. It must be supposed that the legislature of this State decreed ten years as ample time within which to discover the fraud and exhaust legal remedies upon purely legal demands, and the necessity of these prerequisites is no lawful restraint in the sense of those words as used in section 21, article 4, chapter 71, General Statutes. By section 9, ibid, it is provided in substance that if a defendant by departing from the State, absconding or concealing himself, or by any other indirect means obstructs the prosecution of the action, the time of the obstruction shall not be computed as part of the period within which the action may be commenced. This section has been construed several times by this court (Walker, &c. v. Sayers, &c., 5 Bush, 579; Kennedy v. Foster, &c., 14 Bush, 479; McDonald's Ex'or v. Underhill's Ex'or, 10 Bush, 584, and others), but in none of them has it ever been held that the obstruction resulting from persistent legal resistance to a judgment was the character of obstruction meant by the statute. This case was pending in this court on the first appeal from November, 1861, until April, 1867, and on the second from May, 1871, to March, 1874, and on each appeal it was demonstrated that

erroneous judgments were rendered against the appellants in favor of appellees at their instance in the lower court. And no facts appearing in the record showing that the appellants by indirect means obstructed the prosecution of the action, we are constrained to hold that the naked allegation that appellees were prevented from obtaining a judgment by appellants, who caused and compelled the delay without stating the indirect means by which the obstruction was wrought, is not sufficient to bring this case within section 9 above referred to. The great length of time, twenty-one years, between the beginning of the suit and the issuance of the execution would indicate the use of such means by appellants, if they caused the delay, as would be easily specified, or it evidences great laches in the prosecution of their claim to judgment by appellees who, so far as this record and those filed with it show, are more to blame for the delay than the appellants.

Wherefore, the judgment is reversed and cause remanded, with directions to render judgment in accordance with this opinion.

I. &. J. Caldwell & Winston and W. W. Thum for appellants.

Brown & Davie and H. Pope for appellees.

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## KIMBLE v. LEISHER.

(Filed November 3, 1883.)

**Roads—Appeal—An appeal to the circuit court from an order of the county court establishing, discontinuing, or altering a road or passway need not be prosecuted within sixty days as required of other appeals from the county court, but may, under General Statutes, chapter 94, article 1, section 43, be prosecuted at any time within one year.**

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Lewis.

The only question in this case is whether the appeal from the order of the county court establishing a private passway is required by law to be prosecuted within sixty days from the time of such order.

By section 43, article 1, chapter 94, General Statutes, it is provided that a party aggrieved may within one year prosecute

an appeal to the circuit court from an order of the county court concerning the establishment, alteration or discontinuance of a road. And by section 10, article 2, same chapter, it is provided that the law regulating appeals in road cases shall apply to and govern proceedings concerning passways.

But by section 3 of an act of the general assembly, entitled "An act to regulate the appellate jurisdiction of the courts of this Commonwealth," approved May 5, 1880, it is provided that appeals shall lie to the circuit court from all orders and judgments of the county court in cases of bastardy, and of certain other subjects of county court jurisdiction therein mentioned, but not however including roads and passways. And by section 5 of the act it is provided that the manner and time of taking appeals shall be as provided in the Civil Code of Practice.

Though there is no express provision in the Civil Code concerning appeals from judgments and orders of the county court, it was manifestly intended by the legislature that section 729, Civil Code, should govern in respect to cases mentioned in the act, which section provides that appeals taken pursuant to chapter 2, title 16, shall be prosecuted within sixty days from the rendering of the judgment.

The decision of the question, therefore, depends upon whether section 43, article 1, and section 10, article 2, chapter 94, General Statutes, have been repealed by the act of May 5, 1880.

From the time of the repeal of the former Civil Code until the passage of the act of May 5, 1880, there was no law expressly regulating the time of taking appeals from orders and judgments of county courts in the cases mentioned in section 3 of the act, and the effect of its passage was to supply the omission.

But the time for prosecuting such appeals in cases of roads and passways being already regulated by chapter 94, General Statutes, no provision was made in the act of 1880 in regard thereto, the obvious purpose of the legislature being to leave the law unaltered as to them.

In our opinion, therefore, the sections of chapter 94, General Statutes, mentioned are not in conflict with, or repealed by, the act in question. And the lower court erred in dismissing the

appeal upon the ground that it was not prosecuted within sixty days from the time of the order establishing the passway.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

G. W. Stone for appellant.

J. S. Wathan for appellee.

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## McCLURE v. COMMONWEALTH.

(Filed November 24, 1883.)

**1. Infancy—Criminal law—Where appellant, a boy under fourteen, was indicted for a felony, it was the duty of the court sua sponte to protect him from all irregular proceedings during the trial, and, even without objection from his counsel, to exclude all inadmissible testimony, as that the characters of the brother and mother of a boy jointly indicted with appellant were bad. And as there was evidence of insanity, the jury should have been instructed that if appellant did the act in consequence of his youth or mental infirmity, not knowing its wicked character and his responsibility, he should be acquitted.**

**2. Incapacity to commit a crime—The evidence of malice in an infant should be strong beyond all doubt to overcome the presumption of incapacity to commit a crime.**

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellant, Bill Ike McClure, and Jo. Woosley were indicted, tried and sentenced to the penitentiary for one year for the offense of breaking into a store in the night time, with the alleged "intent to commit the felony of grand larceny."

It appears from the record that both of them prayed an appeal to this court, but for some unexplained reason Jo.'s counsel withdrew his prayer for an appeal and consequently only one of these children is before us asking a reversal of that sentence.

The appellant was between thirteen and fourteen years old and Jo. was between twelve and thirteen years old when the breaking took place. It appears that Jo. had a grown brother and that he wanted some pistols and cartridges which were in the store, and got these two little boys to go in and get them for him, and it is quite likely from his character that he is the one who did the boring and breaking necessary to let them into the store.

It was a general store, where money was kept in the drawer, tobacco, etc., on the shelves, and jewelry and pistols in the show case. They did not touch the jewelry and money which are generally the most tempting to a real thief. The only things they took were the pistols and cartridges and a piece or two of tobacco. These facts do not exhibit a voluntary robbery with full knowledge of the character of the offense and the responsibility and seriousness belonging to its commission. These little boys were made the dupes and instruments of an older head, but they should not be made the scape-goat of his crime.

They were tried jointly, and it does not affirmatively appear that they had an attorney present and watching their interest during the whole of the trial, for two things occurred which he certainly would have objected to had he been present when they were done. But in his absence or failure to oppose all illegal action by the Commonwealth's attorney it was the court's duty, of its own motion, without objection or exception from anyone, to protect these children from all illegal proceedings. The court permitted proof of the bad character of Fred Woolsey, the elder brother above mentioned, who was a man grown, that he was a fugitive from justice, and that their mother keeps a house of ill-fame and that Jo. lived with her. There is nothing more natural than for a boy of his age to live with his mother, no matter what she does. And there is no more illegal proceeding than to try the appellant by the character of Jo.'s mother, or either one of them by the character of Fred or the mother, for even upon the trial of either of the latter upon such a charge as this their characters could not be legally proven by the Commonwealth against their objection. If also appears from the record that while their attorney was absent the Commonwealth's attorney, during his speceh, "stated to the jury that Bird Skaggs had been acquitted last Saturday in this court, and that night James S. Wortham's house was fired and burned by him; that he (the Commonwealth's attorney) was not afraid to live in the community; that he could protect himself, and if his house burned he could build another; that Bird Skaggs was a bad boy (about eighteen years old), and so were the defendants in this case, and if released they would do something bad just like Bird had done,

and that the community ought to be protected; that all the people in it could not protect themselves."

This speech was permitted by the court to be made in the concluding argument against two little boys from whose tender age the law presumes they are not criminally responsible, and that presumption prevails until the evidence clearly establishes that they understood the nature of the act charged and its consequences.

Blackstone, page 23, volume 4, says: "The evidence of malice which is to supply age ought to be strong and clear beyond all doubt and contradiction." And this, we think, should be the quantum of evidence where felonious intent is sought to be proven in rebuttal of the presumption of doli incapax which, in this enlightened and humane country, universally exists in behalf of infants under fourteen years old.

The sixth instruction asked by appellant's counsel with instructions Nos. 1 and 2, which were given, and the qualifications as to the degree of evidence and insanity indicated in this opinion would have presented the law applicable to the peculiar facts of this case, and should have been given to the jury. Instruction 6 substantially tells the jury if the defendants broke into the store as charged, but did so at the request of another, and in consequence of youth or mental infirmity, not perceiving the wicked character of the act or not knowing their responsibility therefor, they should acquit them of the felony. It was error to refuse this instruction, which was not substantially given in any other form to the jury.

This is not all. The evidence clearly preponderates to the conclusion that the appellant was not of sound mind. He would drop down on the sidewalk or platform whenever sleep came upon him, and there, like the waif that he was, sleep the sleep of the innocent or unconscious, under no guard but the All Seeing Eye which watched over him. At home, if he had what might be termed a home in the proper sense of the word, he would lie down on the hearthstone or floor and take his sleep instead of repairing to such beds as his parents had. He would fly into a passion on an instant without provocation, and straightway become affectionate and fondling. But no instruction upon this feature of his case was given, as it should

have been sua sponte, by the court, on account of his tender years, and the duty of the court to see to it that his rights were carefully guarded and protected. He was entitled to an instruction on insanity as well as on the presumption of law in his favor based on his age. It would be strange law indeed if the courts were required to protect an infant when only his property was at stake, yet leave him to the tender mercies of a Commonwealth's attorney, who illegally traveled out of the record in search of arguments to secure his conviction for a crime which would consign his person to a dungeon, his name to infamy, and his young life to associations which would blur and distort it forever. This is not law in this country, and we can not give the seal of our approval to such a judgment so obtained, although no objections or exceptions were taken to the conduct of the Commonwealth's attorney or the admission of illegal evidence. (Willet v. Commonwealth, 13 Bush, 230.)

Wherefore, the judgment is reversed and the cause remanded, with directions to grant appellant a new trial.

J. P. Hobson for appellant.

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## RANEY v. RATCLIFF.

(Filed December 4, 1883.)

1. Contested election—Notice—The notice of an appeal from the decision of the contesting board in an election case to the circuit court is definite enough if it allege merely that certain persons named voted for appellant, but their votes were not recorded for him. This shows the grounds of contest, and the fullness of statement required in a petition is not necessary.

2. Practice—Such appeals should be placed on the equity docket, as the evidence must be in writing and there is no right to a jury trial.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Hargis.

The only question in this case is whether the contesting board or the circuit court, on an appeal to it from a decision of the board, ruled correctly in excluding evidence impeaching the correctness of the poll books certified by the officers of the election, there being no specific allegation of mistake on the part of the officers or fraud in the parties benefited thereby.

The appellant was fairly elected to the office of assessor by a majority of some seventeen votes, which, in the light of the evidence, after correcting the errors on the poll books against him, clearly appears.

It is set forth in the notice that certain persons named voted for appellant, but their votes were either recorded against him or not at all. This specific statement shows that the officers made mistakes or acted fraudulently in recording those votes, and it was not necessary to allege in the notice that the acts which were fully described were mistakes, for they show the mistakes better than a mere assertion that the officers had made mistakes. As the law will not presume in the absence of an allegation and proof of fraudulent intent or motive, or of such facts as constitute fraud in law, the notice will be treated as alleging mistake in recording and failing to record the eighteen votes which were proven to have been cast for appellant. Besides this, we do not think that section 17, chapter 81, General Statutes, applies to officers of an election whose action can not be corrected by a court of equity either for fraud or mistake (School District v. Garvey, &c., 80 Ky., 164). Our whole system of laws relative to elections and contested elections are to be administered by the instrumentalities named in the statute and the rules of the common law procedure so far as applicable. Appeals are placed upon the equity side of the docket, because the evidence to be heard in the circuit court is required to be in writing, and the right to trial by jury in such cases does not exist. The agreement of the parties postponing the day of meeting by the contesting board to hear their cause is binding, and neither will be heard to claim the right to violate it after it has been acted on. The only object of the election laws is to ascertain honestly and fairly, by competent witnesses and legal evidence, who, of the persons voted for, receive the highest number of legal votes, and to him, if qualified, award the office.

The notice having plainly stated the grounds of contest, the strictness applicable to a declaration or petition not being required, and the evidence showing that appellant was elected, the court should have adjudged that he was entitled to the office.

Wherefore, the judgment is reversed and cause remanded, with directions to enter judgment in accordance with this opinion.

C. W. Parsons and Walter Hawkins for appellant.

W. Lindsay for appellee.

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The opinion of the court in Louisville Bridge Co. v. City of Louisville was published in the July number, page 26.

Below we give the dissenting opinion of Judge Lewis, which has been recently filed, and a separate opinion by Judge Pryor.

## LOUISVILLE BRIDGE CO. v. CITY OF LOUISVILLE.

(Filed December 10, 1883.)

**Taxation—The city of Louisville has the constitutional right to tax a bridge which extends from a point within the limits of the city across the bed of the Ohio river to low water mark on the opposite side; the city limits extending to low water mark on the opposite side, the bridge is within the territorial jurisdiction of the city. Besides, it enjoys the benefit of gas, of police and fire departments provided by the city, and (being a railroad bridge) uses the streets of the city in a manner not allowed to private individuals. The fact that it extends over the river bed, which is land not capable of division into lots and streets, is no reason for exemption from taxation.**

Appeal from Louisville Chancery Court.

Judge Lewis delivered the following dissenting opinion:

Section 6 of the act to amend the charter of the city of Louisville, approved March 3, 1871, under which a portion of the bridge property of appellant was assessed for municipal taxation for the years 1874, 1875, 1876, is as follows: "That all railroad depots, depot grounds, machine shops and improvements, as well as all the property of bridge companies, express and transfer companies within the corporate limits of said city, shall be assessed and subject to taxation at their fair value, as of the 10th day of January of each year, for all city and school purposes."

As the question is raised whether the act embraces the property attempted to be made subject to taxation, it is proper that the scope and meaning of it be determined before passing upon its validity.

It is clear that the legislature intended by the act to subject to municipal taxation certain kinds only of property within the city limits belonging to railroad companies, which were enumerated. While certain other kinds, such as hacks, rolling stock, etc., were not enumerated because intended to be exempt from such taxation.

It would seem that if it had been the intention to exempt any kinds of property belonging to bridge, express or transfer companies it would have been indicated in the same manner and at the same time. But instead language was used in regard to their property so comprehensive, and in such contrast to that applied in the same sentence to property of railroad companies, as to forbid the conclusion that such exemption as is contended for was intended

It is, however, agreed that the following rule of construction is applicable: "When general words follow particular words the rule is to construe the former as applicable to the persons and things particularly mentioned." But as bridge companies do not necessarily, nor express or transfer companies even, require railroad depots, depot grounds, machine shops and improvements, nor any property of like kind, the rule can not apply. To attempt to apply it would involve the absurdity of making the phrase "all the property of bridge companies, express and transfer companies," signify all the property of bridge companies except their bridges and ways over which they are built, and of rendering it meaningless when applied to express and transfer companies.

It is not to be presumed, nor does the language used warrant the assumption, that such abortive legislation was intended. In my opinion all the bridge property of appellant within the city limits is embraced by the act, and should be now so treated, notwithstanding the delay in assessing it for taxation.

It being conceded in the opinion of the majority of the court that legislative power exists to subject to taxation for State revenue purposes all appellant's bridge property within the territorial limits of the State, what I shall say will relate to the question of the constitutionality of the act of 1871, which subjects all of the same property within the territorial limits of the city of Louisville to municipal taxation. And to prop-

erly determine that question it is necessary to ascertain the character of the property and its situation and relation to the city.

By an act of the general assembly, approved March 10, 1856, certain persons therein named were constituted and declared to be a body-corporate under the name of "The Louisville Bridge Co.," with all the rights and powers necessary for the construction of a bridge across the Ohio river, extending from some convenient point within the corporate limits of the city of Louisville to some convenient point on the Indiana side of the river opposite to said city, and also to purchase or condemn and hold so much real estate as might be necessary for the site of said bridge, or the sites of the piers, abutments, toll houses and suitable avenues to the same, and such other lands as might be necessary.

By an act approved February 19, 1862, it is provided that the charter of "The Louisville Bridge Co.," approved March 10, 1856, be revived and confirmed to James Guthrie and his associates, as successors to those named in the charter, and that they be vested with all the power and rights conferred by the charter, etc.

By virtue of these two acts appellant exists as a corporation, and in the exercise of the power and rights conferred thereby acquired the necessary land for the purpose, and in the year 1870 completed the bridge mentioned at a cost of about two million of dollars.

From an agreed statement the following additional facts bearing on the question appear:

1st. The entire length of the bridge is 5,294 feet, of which 821 feet is within the State of Indiana, north of low water mark; 4,076 feet extends from the north line of the Louisville & Portland canal over the bed of the river to low water mark on the northern bank, and is within the corporate limits of the city of Louisville as defined by an act of the general assembly, approved March 9, 1868, and 397 feet is south of the north line of the canal and likewise within the corporate limits of the city.

2d. The bed of the river over which said bridge is erected can not be laid off into streets, nor occupied as places of residence, nor can it be used as a passway from any part of said

city to any other part. But during the lowest stage of water, the duration of which varies yearly from two to five months, numerous persons are engaged in quarrying and transporting rock from the bed of the river on railway tracks passing under the bridge.

3d. Appellant patrols its bridge day and night by its own officers and does not, and never has, required or received any assistance from the police force of the city between the north line of the canal and low water mark on the Indiana shore. Appellant has no use for the city police—has at its own expense erected a structure immediately over the Kentucky chute of the river, which is used and occupied by its own employes to guard said bridge and secure the safety of persons and trains passing over it. But on one occasion during the riots in 1877 the mayor directed the police force of Louisville, together with citizens, soldiers and militia to, and they did, enter on and guard the bridge structure.

4th. That the bridge of appellant is used for foot passengers, and upon it is a track over which railroad trains pass.

5th. That the bridge structure north of the north line of the canal was not assessed for taxation for either the years 1874, 1875, 1876, until August 1876, and that portion south of the north line of the canal has not been assessed.

It thus appears that the property of appellant sought in this action to be made subject to municipal taxation is that part of the right of way and the bridge structure between the north line of the canal and low water mark on the northern bank of the river, and is described in the assessor's list as the right of way, and bridge improvemment thereon, conveyed May 28, 1867, by Rowan's executors and devisees, and June 5, 1867, by Lytle's executors, etc., the assessed value for each year being $750,000.

It further appears that of the amount to be levied and collected, according to the assessment, one-fourth of one per cent. was to be applied to the city schools which constitute a part of the common school system of the State.

Why that part of the bridge and right of way south of the north line of the canal was not assessed as a part thereof, and at the same time the part north of that line was, does not appear. The omission, however, does not affect the question of

the constitutionality of the act of 1871, nor afford appellant any ground of complaint, for the whole bridge structure, together with the right of way that is within the corporate limits of the city, is subject to municipal taxation or else no part is subject. All the parts are necessary and indispensable to make an entire bridge, and neither that part north nor that south of the north line of the canal can be taken from it without rendering useless the entire structure. But yet while the bridge must be regarded as an entirety and inseparable, appellant has no more right to complain that less than the whole has been assessed than if the whole had been assessed at less than its actual value.

Referring to the spirit with which the judiciary should always consider a question involving the validity of an act of legislation, having the force of law and the rule which should control in the determination of it. Justice Washington, in the case of Ogden v. Sanders, 12 Wheat., 270, said: "It is but a decent respect due to the wisdom, integrity and patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." And this rule is peculiarly applicable in considering the validity of tax laws. For taxation is essential to the existence of government, and while the power may not be arbitrarily exercised, it extends without constitutional restraint to every subject of taxation within the limits of the State.

The Constitution of the State was framed with municipal corporations in view, and they are recognized in it as parts of the governmental machinery, and are necessary auxiliaries in carrying out the modes of government. In the language of this court: "The city of Louisville, to the extent of jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and administration of law are legislation and administration by Kentucky through the agency of that municipality." (City of Louisville v. Commonwealth, 1 Duvall, 295.)

But for the support of such local government the burden of taxation must be imposed upon persons and property rightfully within its jurisdiction in addition to that borne in common with those outside its limits for the direct support of the State

government. And the object of the act in question was to impose upon the bridge property of appellant within the city limits, but not by the terms of the charter before subject to municipal taxation, the same burden as that borne by other real property within the city.

I am unable to perceive what clause of the Constitution, or how the spirit of that instrument, has been violated by the act.

The only clause suggested is that part of section 14, article 13, which declares: "Nor shall any man's property be taken or applied to public use without the consent of his representative, and without just compensation being previously made to him."

In the case of Cheaney v. Hooser, 9 B. Monroe, 330, this court, speaking of the manner and extent to which that clause can be applied to local taxation, said: "It must be obvious * * that the clause in question was not intended to exclude or even restrict the ordinary power of general or local taxation inherent in the legislative department of the government and that there must necessarily be vested in that department a wide range of discretion, not only as to the objects for which a tax, general or local, may be enforced, as to which its judgment would seem to be conclusive, but also as to the particular subjects or species of property which shall be liable to taxation, and as to the extent of territory within which a local tax shall operate." And in regard to the limit of that discretion said: "That limit can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of the taxation are regarded by the legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or in some other form the taking of private property for the use of others or for the public without compensation. Exact equality in the distribution of public burdens, and especially of such as are local, is unattainable, and can not form the test of the distinction referred to. There must be a palpable and flagrant departure from equality imposed upon the persons and property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others, or for purposes in

which they have no interest, and to which they are not, therefore, justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the subject to be accomplished by it."

The question involved in that case was as to the power of the legislature to extend the corporate limits of a city or town and to include and subject to municipal taxation persons and property not before subject. The same question arose in the cases of Sharp's Ex'or v. Dunavan, 17 B. Monroe, 223; Maltus v. Shields, 2 Met., 553; City of Covington v. Southgate, 15 B. Monroe, 491; Arbegust v. City of Louisville, 2 Bush, 271; Swift v. Newport, 7 Bush, 37; Courtney v. Louisville, 12 Bush, 419. And though in some of these cases the validity of the law extending corporate limits was sustained, and in others not the principles announced in Cheaney v. Hoover, supra, were in all approved, and the same rules for determining the validity of such laws adopted in all.

In the case of Maltus v. Shields, supra, when the law was sustained the court held that where the persons brought into a town had nearly all the advantages which actual citizens derived from its business improvements, institutions and its good government, no such flagrant case is presented as authorizes the conclusion, at first blush, that the taxation imposed was the mere taking of private property for public use without compensation.

In the case of Courtney v. Louisville, supra, referred to in the opinion of the majority of the court, where the law was invalid, the court said: "Something more than benefits is necessary to warrant that character of taxation. There must be both benefits actual or presumed, and a town or city population on or near the land creating a necessity, or at least rendering it not unreasonable that the municipal government should be extended over it. But if, considering the location of the property with respect to actual population, it plainly appears that it is not near enough to such population to require municipal government, and the property has not been laid out

into lots and could not be profitably so used, it ought not to be taxed for city or town purposes."

Of course the converse of these propositions must be taken as true. And being so, it follows that in all cases where city or town limits are extended, if those embraced by the extension are actually or presumptively benefited, and a town or city population is on or near the land creating a necessity, or rendering it not unreasonable that a municipal government should be extended over it, the law imposing such taxation is valid.

I do not understand the court in that case to have decided, as has been suggested, that real property embraced in an extension of city or town limits could not be lawfully subjected to municipal taxation unless laid out into streets and town lots, or adapted for such purposes. That the court did not in that case intend to prescribe such a test is shown in the reference therein to the case of Robinson v. City of Louisville, MS. opinion. Robinson was the owner of a parcel of land containing twenty acres or more which was held by this court liable to municipal taxation, though not laid out into lots. And referring to that case this court said that "the facts showed that whatever might be the uses to which Robinson's land was applied it was more valuable as city property than for any other use," while the facts in this, Courtney's case, show "that appellant's land can not be sold out in lots at remunerative prices and is more valuable as agricultural land."

What the court in that case obviously intended to decide, and did decide in that regard, was that land adapted, used and valuable only as agricultural land and so situated as not to require or derive direct benefits from the city government or from its improvements should not be subjected to municipal taxation. To have decided otherwise would have been in conflict with all the cases referred to. As said by the court in Maltus v. Shields, supra, whether the land made subject to municipal taxation is used for one purpose or another is wholly immaterial. The law has fixed a more certain and less fluctuating test for determining so important a right as that of local or municipal taxation.

If such test be applied private parks and gardens, peculiarly valuable, because they contain large areas of land not divided into lots, would be exempt. The lands of railroad companies

and of many manufacturing companies, necessarily in large bodies that can not be advantageously divided, and canals, streets and elevated railways, and many others species of real property not at all susceptible of division into streets and lots, would all be exempt.

But this is not the case of real property brought against the will of its owner under the taxing power of a city or town by the extension of corporate limits. Nor does the question properly arise whether it is or not reasonable that municipal government should be extended over it. On the contrary, by an express provision of its charter, appellant's bridge was required to be located at a point within the corporate limits of the city of Louisville, and extend therefrom to the opposite side of the river. And 394 feet of the bridge, with its appurtenances, has been actually built within the limits as they existed when the charter was granted, and 4,074 feet of it, being the residue within the limits of the State of Kentucky, has been built within the limits established by laws in 1868, two years before its completion.

Appellant having thus elected to construct its bridge within the limits of the city, and availed itself of the right conferred by the charter to appropriate for the construction and enjoyment of its corporate property the necessary land situated therein, whether property of individuals or streets and alleys dedicated to the use of the city, is now precluded, in justice and in law, to claim exemption from taxation imposed upon other property in the city.

Cases have been passed upon by this court when local taxation was held unlawful, because persons and their property were against their will included in an extension of city or town limits and subjected to taxation for the benefit of others and for purposes in which they had no interest. But no case can be found where the imposition of municipal taxation upon property, either personal or real, voluntarily brought or built up by its owner within corporate limits already established by law, was held to be a violation of the Constitution.

The bridge of appellant was located with a view to the population, the business and local government of the city of Louis-

ville; and it is manifest never would have been built but for the benefits and advantages afforded by its relative situation.

As a toll bridge it is valuable in proportion to the population and business of the city; and as a railroad bridge it would be valueless without the right to occupy the streets of the city and other land situated within the city limits. It is especially valuable as a connecting link between northern and southern railroads concentrating on opposite sides of the city. But the two systems could not be connected without the passage of trains through the heart of the city, along its public thoroughfares, to the injury and inconvenience of citizens and displacement of other business. It is so situated as to have the benefit of waterworks, gas and electric lights, street railways and all the other advantages and conveniences incident to a city.

It has the benefit of sewerage and of streets and avenues leading to the entrances of the bridge and to the offices, etc., connected therewith, all provided and kept in repair at the expense of the city government, and all indispensable to the full enjoyment of appellant's property.

Its officers and employes, if not owners, reside on and have the benefits of the institutions, the improvements and the government of the city.

In addition to the actual benefits thus received, the bridge property of appellant has as acceptable, and in as full measure as is enjoyed by any other property within the city limits, the protection afforded by the fire and police departments, kept up at the expense of the city government. And that the bridge property of appellant requires the sufficient and ready protection afforded by trained policemen at hand would be obvious without reference to the riot mentioned in the agreed statement of facts by which its destruction was threatened.

It may be true that appellant employs men to guard its property. So do bankers, merchants and other owners of valuable city property peculiarly liable to depredation and destruction by fire employ private policemen. But that fact has never been held a sufficient reason for exempting them from municipal taxation.

Thus appellant has for its bridge, which is in a part of and dependent upon the city, the protection and benefits of the

municipal government enjoyed by natural persons residing therein, and in addition the extraordinary privilege under its charter of appropriating and using both private and public property within the city limits for the better enjoyment of its own.

Why then should this court declare a solemn act of legislation void as to appellant, the effect of which is simply to require it to bear its ratable share of the burdens of that municipal government?

It is contended that as the land spanned by that part of the bridge north of the north line of the canal can never be laid out into lots and streets, and consequently can not be subject to city taxation, that it would be anomalous that immovable and permanent buildings erected thereon should be taxed.

It has been shown that the adaptability of real property to be laid out into streets and lots has never before been held by this court as a test of its taxability for municipal purposes.

It is true the land between the north line of the canal and the Indiana shore is for the most part covered with water and only used as a stone quarry, but even if it was entirely valueless for every other purpose it is certainly valuable as a foundation upon which the piers of the bridge structure rests, and that it possesses a market value is shown by the conveyances from the heirs and devisees of Rowan and Lytle.

The bridge of appellant being useful and valuable to its owner, possesses a taxable value without regard to the state or condition of the land upon which it rests, and should be assessed and made liable to municipal taxation, just as property in ferries, which it takes the place of, is lawfully subject.

If the bridge of appellant is to be regarded as not subject to municipal taxation because the land upon which the piers rest for their foundation is not subject, for the same reason it would be exempt from all taxation. And if any part of appellant's bridge within the corporate limits of the city of Louisville be exempted from municipal taxation, then all bridges, without regard to their size, are likewise exempt. For the rule that exempts appellant's bridge can not be relaxed, much less changed, so as to subject others.

And as a result of the ruling in this case there will be a vast aggregation of capital invested in bridges built across the Ohio

river and other water courses in the State, amounting to many millions, in the hands of corporations, receiving all the benefits and protection of municipal governments conferred upon other property, yet exempt from the burdens.

The constitutional power of the legislature to subject bridges situated in towns and cities to municipal taxation has never before been denied by this court, nor has a single case been cited where it has been denied or even called in question by any court in the United States.

Being unable to see in what manner the clause of the Constitution is violated by the act of 1871, but clear in my conviction that the logical consequence of the opinion of the majority of the court will be to confer upon a large class of men exclusive, separate public emoluments or privileges in violation of section 1, article 13 of the Constitution, I feel it my duty to dissent from that opinion.

Judge Pryor delivered the following separate opinion:

**So much of the bridge as extends through the city down to the river at its low water mark is subject to taxation by the city, but that part which runs out and spans the river over to the opposite shore can not be taxed by the city. The city limits extend to the opposite shore, but for police purposes only and not for taxation. But the State has the right to tax the entire bridge, at least as far as low water mark on the Indiana shore.**

The principal opinion in this case proceeds on the idea that upon the agreed state of facts the corresponding benefits, actual or presumed, to the property are not such as authorized the imposition of the tax sought to be recovered. It appears that the bridge company for several years listed all of its property for taxation that it supposed was liable, or rather it was assessed by the city, and the taxes paid. The bridge structure and right of way seem to have been omitted, and the city authorities regarding that part of the property as subject to taxation by the municipal government, valued it at $750,000, and is seeking in this action to enforce its lien for back taxes for three years, amounting in the aggregate to $51,975.

That the structure may be taxed by the State for revenue purposes there is no doubt, but when proceeding to tax it for municipal purposes, on account of benefits received, it presents

a different question. The structure rests upon the Kentucky and Indiana shore, and so much of the ground owned by the company and its property as lies between low water mark on the Kentucky side, or the northern boundary of the canal and the city of Louisville proper, is already taxed, or if not, is conceded to be subject to taxation. It is argued that the bridge is an entirety, and no imaginary measure can be made of it in determining this question, and that if a part is liable the whole structure should be taxed. The bridge extends over the soil of Indiana and beyond the jurisdiction of this State, and the measure must be made at low water mark on the Indiana side, or the State of Kentucky permitted to tax property outside of the State limits. In making, therefore, a part of the bridge liable, if the legislative intent was to omit the structure, I see no reason why the taxation should not be confined to the land and improvements on the Kentucky side of the river or only so much of it as is found within the taxable boundary of the city.

When you leave the shore at low water mark and attempt to tax the structure from that point to the Indiana shore upon the facts conceded in this case, you might, for the same reason, take an island in the middle of the river for no other reason than its proximity to the city, and because the city boundary extends to low water mark on the opposite side.

This extension of boundary was only intended to enlarge the judicial jurisdiction of the city, and not to make that taxable on the river that otherwise could not be the subject of taxation. A bridge connecting two cities may be so located and used as to subject the entire structure, so far as the jurisdiction of the State extends, to local taxation, but located as this bridge is, and considering the benefits named, it is manifest that it was not the intention of the law-making power that the structure should be taxed or the company made bankrupt by imposing upon it such heavy burdens. It is but a continuation of the line of railroads running to and through the city of Louisville upon which much of its future prosperity depends, and the framers of the act of 1871 did not contemplate the taxation of this bridge as it is now attempted to be taxed by the city. The sixth section provides: "That all railroads, depots, depot grounds, machine shops and improvements, as

well as all the property of the bridge companies, express and transfer companies, within the corporate limits of said city shall be assessed and subject to taxation at their fair value, as of the 10th of January of each year, for all city and school purposes." The city authorities construed this section in failing to impose the burden for five or six years upon more of the bridge property than is conceded is liable for taxation.

Their failure to tax such a structure, if liable, could not have escaped the attention of the able and vigilant officials supervising the judicial affairs of the city government. The structure and railway track of a railroad company is certainly not embodied by the act, and if not, I can not see how the extension of the track upon the wooden bridge is to be made liable upon any fair and just construction of the provisions of the section under which the power to tax is asserted.

If an island in the river could not be taxed, although the owner had free access to the streets and was incidentally benefited as in the Courtney case, 12 Bush, 419, why should the wooden structure deriving no other benefit be required to assume the burden. You discriminate between the corporation and the citizen, taxing the one and exempting the other, and this view no doubt controlled the construction given this section for so many years prior to the institution of this action. I do not mean to say, nor do I understand the principal opinion to decide otherwise, that such a structure might not, by reason of the character of its use, its location, and the benefits resulting to it from the local government, be made the subject of municipal taxation. It might become as indispensable as the streets of the city and its protection and preservation by the city government rendered absolutely essential, but when considering the legislative enactment under which this power is claimed, the location of this structure, its use and the benefits said to be derived from such taxation, in my opinion, can not be rightfully asserted. I, therefore, concur in reversing the judgment below.

W. Lindsay, I. & J. Caldwell & Winston and Bullock & Anderson for appellants.

T. L. Burnett and Lane & Harrison for appellee.

# TAYLOR v. FARMER.

(Filed December 6, 1883.)

1. Fraud—Suppressio veri—T. having sold a certain lot of whisky to G., and issued a warehouse receipt to him therefor, afterwards sold the same whisky to F. without disclosing to him the previous sale to G. In an action against him by F. to recover for the fraud, it is held that T. can not escape the consequences of failing to disclose the previous sale by setting up that he acted from honest motives, relying upon a writing from G., which he construed as giving him authority to make the sale.

2. Bankruptcy—Discharge—A composition agreement with his creditors does not discharge a bankrupt from liability on claims arising out of his fraud, even though the claimant may have accepted his pro rata with other creditors, provided he did not agree to release the debtor.

3. Pleading—Composition—Where a composition discharge is relied on it must be alleged to have been made bona fide and to have been strictly complied with.

4. Pleading—Denials—Where two or more facts are denied conjunctively, the denial is not sufficient as to either.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hargis.

Farmer bought one hundred barrels of whisky from Taylor, who executed to him a warehouse receipt therefor, and to whom he paid $2,985, the purchase price of the whisky. Before Farmer bought the whisky Taylor had issued a warehouse receipt for seventy-six barrels of the same whisky to Gregory & Stagg. In a controversy begun soon after the discovery by Farmer of the existence of the warehouse receipt which Taylor had issued to Gregory & Stagg, they succeeded in establishing their claim to the seventy-nine barrels as superior to that of Farmer.

He then brought this suit against Taylor alleging the facts recited, and that Taylor had fraudulently concealed from him the sale of the seventy-nine barrels and the issuance of the warehouse receipt therefor to Gregory & Stagg, and failed to inform him of the encumbered condition of the whisky; that Taylor was informed of the legal controversy between Gregory & Stagg and the plaintiff and testified that he had no authority from Gregory & Stagg to issue the warehouse receipt to the plaintiff. Upon these facts the plaintiff demanded judgment for damages sufficient to repay him the sum he had paid for the whisky, with interest and his expenses, except attorney's

fees, in prosecuting his suit against Gregory & Stagg. To the petition Taylor demurred and the court having overruled it, he answered, pleading that he had become an involuntary bankrupt and had made a composition with his creditors by their vote, in number and manner required by the bankrupt law; that the plaintiff had proved his claim and had been tendered his share of the composition to be paid in cash, being six cents on the dollar, and notes for the deferred installments at 120 and 240 days, each being for seven cents on the dollar, with Gregory & Stagg, who had been approved as sureties. He then proceeds to deny all fraudulent motive, but does not deny in the disjunctive the allegation that he had suppressed from Farmer the facts that he had both sold the seventy-nine barrels to Gregory & Stagg, and issued to them a warehouse receipt therefor. He denied that he fraudulently concealed from plaintiff notice of "the fact that he, defendant, had previously sold said whisky and issued a warehouse receipt for the same to Gregory & Stagg, or that he had concealed or suppressed said fact at all;" and denied that he had admitted he had no authority from Gregory & Stagg to sell the whisky, but says he admitted that he had no authority from them to sell except such as was given him by a written memorandum then before him and which this court has decided was an authority to sell (Farmer v. Gregory, &c., 78 Ky., 475). He does not allege that he informed Farmer of the existence of the memorandum or the warehouse receipt to Gregory & Stagg when he sold him the whisky.

In explanation, however, of his motive he avers that he considered that the memorandum gave him authority to sell, and that he only hypothecated the whisky to Gregory & Stagg for advances, and believed he would be able to pay them off and make perfect the title of Farmer. The court necessarily compelled Taylor to paragraph his answer, and then sustained Farmer's demurrers to each paragraph. If, therefore, the answer as a whole presents a defense the demurrers should have been overruled. That is the question and the only question necessary to be determined.

The answer fails to show any legal composition that would defeat the action because the debt is alleged to have been created by fraud, and as the facts constituting the fraud are not legally

denied, the plaintiff's allegations must be taken as true, and the bankrupt law, section 5117, declares the dividends on such debts shall only be a payment on account of them, but no such debts "shall be discharged by proceedings in bankruptcy."

The dividends mentioned in that section embrace those sums which may be declared from time to time as the pro rata shares of the creditors, whether those shares are the result of composition or any other mode of ascertaining them according to the terms of the bankrupt law. And even if Farmer had accepted the share forced or voted upon him by a majority or two-thirds of the creditors, it was only a dividend so far as he was concerned unless he had joined in the composition and agreed to Taylor's discharge from his debt.

Besides, this view of the case Taylor failed to allege that this composition was for the purpose of discharging him from debts which could not be discharged by proceedings in bankruptcy, and it clearly appears from his averments that it was simply a mode of ascertaining in the cheapest and briefest way the dividends his estate would pay so that he might be discharged in bankruptcy from such debts of which it declares he may be relieved, and no other. Nor does he aver that the sureties tendered on the composition notes were either good or solvent. They may have been approved, yet within the knowledge of Taylor perfectly worthless, therefore, such an allegation is not an averment of solvency which was as essential to a proper tender of the notes as genuine money was to the tender of the cash part of the alleged composition. So that he failed to allege sufficiently a counterclaim or payment or credit to the extent of the composition which should have been complied with in reference to all the creditors, but it is not even alleged that he paid any of them. No discharge can lawfully follow a composition unless the terms of it are strictly complied with and the amount distributed or secured.

For aught that appears in the answer none of the creditors may have been paid or secured and the composition may have been the result of a fraudulent vote of friendly creditors who were to receive more than the composition as a consideration for forcing the unwilling minority to take less than the estate was able to pay. The answer should have closed the door upon

such inferences by stating the facts which would have shown a bona fide and legally effected and existing composition.

It may be possible that Taylor's motives were pure from his explanation of the memorandum and his supposed ability to pay the advances of Gregory & Stagg, but such an explanation in law is no denial of the charge that he suppressed essential facts which, had he disclosed to Farmer, would have put the latter upon his guard and enabled him to protect himself. The charge is that Taylor, when he sold to Farmer, fraudulently suppressed the facts that he sold the whisky to Gregory & Stagg, and that he also issued a warehouse receipt to them for it. He denies that he did both fraudulently, and denies that he sold the whisky to them, but he does not deny that he withheld from Farmer the fact of the sale or the fact of the issuance of the warehouse receipt to Gregory & Stagg; he only denies that he did so fraudulently.,

His confused denial of the fraudulent suppression of the sale and the existence of the receipt is no denial in law of either, for he may have done one, but not both, and as he leaves it in doubt, an uncertainty which he means to deny, he must bear the consequences, for there is no aider in law to such pleading.

Leaving off the charge that he frauduently suppressed the information from Farmer, the allegation of the facts that he had sold the whisky or had issued a warehouse receipt, which is commercial in its nature, and in the hands of an innocent holder for value would have been at least superior to a subsequent receipt, and that he failed to inform Farmer of what he had done, would have constituted a fraud in law, and no explanation of the motives of Taylor could relieve him from the consequences of his acts.

The last analysis of the pleadings on both sides of this case show that Taylor first, if he did not sell, encumbered the whisky with a lien for advances and issued to nonresidents a warehouse receipt which is the holder's title and his evidence of constructive possession and of high commercial value in selling the whisky and transferring the title to it, and without disclosing these essential and very important facts to Farmer,

sold to him the identical whisky for full value, even with good title, and in violation of a highly penal and criminal clause of the warehouse law, issued to him a warehouse receipt, thus doubling the evidence of title to the whisky and placing Farmer in antagonism with Gregory & Stagg, whom he had previously armed with an older and better title. Of these facts which would have deterred any man of ordinary judgment from parting with full value for the whisky, Farmer was wholly ignorant and permitted so to remain by Taylor, although prudence, fair dealing and the plainest dictates of business honor demanded of him that he should inform Farmer of the facts, and in their light let him act for himself. The failure to disclose the facts alluded to, which transpired between Taylor and Gregory & Stagg before the sale to Farmer, was, according to principle and authority, an actual fraud which can not be avoided by allegations of honest motives or escaped by misinterpretation of their meaning or the supposed power of Taylor at the time of his failure to speak, to ward off their ruinous effects which afterwards fell upon Farmer. (2 Kent, 482; In Re Smith's, 3 N. B. R., 98; Peebles v. Stephens, 3 Bibb, 324; Beard v. Campbell, 2 A. K. Marshall, 125.)

It is wholly immaterial whether Taylor wilfully or intentionally concealed those facts, or intended to defraud Farmer at the time, for the facts were material to the transaction and they were such as ought to have been disclosed, because Taylor must be considered as knowing that Farmer was acting on the presumption that no such facts existed, and the pleadings of Taylor show that Farmer had not the slightest suspicion that the whisky when he bought it was sold, encumbered or receipted to anyone else. For these reasons the action of the court in sustaining the demurrers to the answer was proper, and there being no error in instructing the jury, or their assessment of the damages which embraced the amount Farmer paid Taylor for the whisky, with interest and the costs and expenses, save attorney's fees, he incurred in defending and asserting his claim to the whisky under Taylor's receipt, the judgment is affirmed.

A. Duvall and Wm. Lindsay for appellant.

J. & J. W. Rodman for appellee.

## LEE, &c. v. JAMES.

(Filed November 24, 1883.)

1. Recording deed—A and wife conveyed land to B, but the latter failed to put the deed to record until A had died and his widow was claiming dower in the land, because the deed not having been recorded in eight months was inoperative. B then, for the first time, had the deed recorded, eighteen years after its execution, claiming that General Statutes, chapter 24, section 22, which provides that deeds shall be effectual from the time they are recorded, protects him, but it is held that the statute does not apply where the deed has remained unrecorded eighteen years and an adverse right, like the dower claim in this case, has in the meantime attached.

2. Dower—The land sold by A to B was subject to a lien for unpaid purchase money due a prior vendor, which B assumed to pay off. Held—That as A's wife was not entitled to dower as against the lien for purchase money due by A, so she could not claim dower as against B, who had acquired the land on condition that he should assume that lien.

3. Dower is a right to the use of one-third of the land for life. It is not proper to fix the value of this right in cash and require the owner of the land to pay it or submit to a sale of the land.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

Porter and wife conveyed a lot of ground in the city of Covington for the consideration of $624.25 to Alexander James; $100 of the purchase money was paid in hand and the balance was payable in one, two, three and four years, for which notes were executed and a lien retained in the deed to secure the payment. James sold this lot to Chambers, Chambers to Morse and Morse to the appellant, Lee, who is the present owner.

James and wife executed a conveyance to Chambers, properly acknowledged, in June, 1862, but this deed was not recorded until the year 1880, eighteen years after its execution and delivery and after the death of James, the grantor. After the death of James, which occurred in the year 1879, his widow, the present appellee, instituted this action for dower based upon the failure to have the deed recorded within eight months. It was not recorded until after the right of the wife to dower had attached, and not until eighteen years from its execution, and, therefore, we will not stop to inquire as to the effect of chapter 24, section 22, General Statutes, authorizing deeds to be effectual from the time they are recorded, although they may not have been recorded within the time provided by law;

if regarded as a creative statute it should not apply to a conveyance executed eighteen years before it is recorded and not then until after the death of the grantor, and the right to dower becomes vested in the widow.

The consideration paid by Chambers was $160 in money to James, and the assumption of the purchase money notes to the vendor of James, and these lien notes were afterward paid by Chambers.

James never had any interest in this land that was not subject to the lien, and that the widow is not entitled to dower as against a lien for the purchase money is too well understood to require authority in support of it. That question is settled not only by the decisions of this court but by positive statute. The question advanced in this case is that Chambers paid the price to James by assuming to pay the vendor, Porter, and that if he had paid James and the latter had paid Porter the widow would have been entitled to dower. He never, however, paid James, and no part of the purchase money notes was paid by the latter. If this is regarded as a payment to James, then James should have made to Chambers a deed free from any lien. The vendee of Porter is unable to pay for the lot and agrees with Chambers that if he will pay him $160 in money and discharge the lien he may have the property. The lien was then discharged by Chambers and no one else. What is the difference in a sale by the chancellor to pay the purchase money, and a sale by the vendee when he finds he is unable to pay his vendor? The chancellor makes the sale in the one case and the vendee himself makes it in the other. It is not the sale by the chancellor that protects the vendee from the claim of dower, where the sale is to satisfy the lien notes, but it is because the husband's title is subject to the lien, and the wife's right to dower is made to depend on the fact as to whether or not the husband's seizin was beneficial. It is only to the extent that he is beneficially interested that the wife can claim. If the wife's right to dower is subordinate to the vendor's lien, a question not controverted, then its discharge by Chambers is not for the benefit of his vendor, but for his own benefit, as he becomes the owner of the property by assuming to discharge the incumbrance. In this case the chancellor proceeded against the objection of the appellants to ascertain the cash value of

the property and gave the dower in money, and then ordered a sale of the house and lot to pay it. We are not aware of any rule of law or equity that will authorize the chancellor to assign dower in this manner. He can not fix a cash value and require the owner of the land to pay it, or subject the land to its payment without his consent. When the land has already been converted into money, or where the parties consent that that may be done, but if not, as said by this court in O'Donnell v. O'Donnel, 3 Bush, 216, "the widow is only entitled to the use of one-third of the land for life," and where the land is indivisible she is entitled to one-third of the rents. The property can not be sold, although indivisible, at the instance of the widow claiming dower against the consent of the owner of the land (Liederkrantz Society v. Beck, 8 Bush, 597.) It was also error to allow rents or interest from the death of the husband; it should have been from the institution of the suit. But is the widow entitled in this case?

The fifth section of article 4 of chapter 52, General Statutes (the same section is found in the Revised Statutes), provides: "The wife shall not be endowed of land sold but not conveyed by the husband before marriage, nor of land sold in good faith after marriage to satisfy a lien or incumbrance created before marriage, or created by a deed in which she joined, or to satisfy a lien for the purchase money. But if there is a surplus of the land or proceeds of sale after satisfying the lien she shall have dower or compensation out of such surplus, unless the surplus proceeds of sale were received or disposed of by the husband in his lifetime." The statute makes no distinction between sales by the chancellor to satisfy the lien and sales by the owner. Here the sale was made to satisfy the liens by the husband of the appellee, and what was left after discharging the liens he received into his possession. Suppose the lot had been sold by the chancellor and the purchaser had bid the amount of the lien notes and $160 in addition, and this money had been paid over to the husband, the wife would have been deprived of dower; or where the sale is made by the husband, and the party required to discharge the liens, as in this case, no claim for dower can be asserted. The appellants are not claiming that their money was paid to James and by him ap-

plied to the discharge of the lien, and by this means obtain the application of an equitable rule in their behalf, but they allege, and the evidence shows, that he was to discharge the liens and pay James $160. This was done, and the wife's right being subordinate to the liens and the husband receiving the $160, she is not entitled to dower. Any other construction of the statute would preclude the husband from selling to satisfy the lien without the consent of the wife, and require him or his vendor to subject the estate to sale for that purpose by the aid of a court of equity.

Judgment reversed and cause remanded, with directions to dismiss the petition. It is objected that the assignment of errors is sufficient. The objection is to the judgments on page 53 and 55 of the record; that the court erred is evident therein. This brings up the question as to whether on the facts the appellee is entitled to recover.

Pryor & Chambers for appellants.

A. C. Ellis for appellee.

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## WARD v. THOMAS.

(Filed December 4, 1883.)

**Voluntary conveyance—Notice—The mere recording of a voluntary conveyance is not sufficient to infect an antecedent creditor with notice. And General Statutes, chapter 71, article 3, sections 2 and 6, which provide that actions for relief on the ground of fraud must be brought in five years from the discovery of the fraud, having been held to apply to an action to set aside a voluntary conveyance as constructively fraudulent, it is held in this case that the discovery is not to be reckoned from the date of recording the deed, but from actual notice to the antecedent creditor.**

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Hargis.

This was an action in equity after a return of "no property," brought by appellee July 13, 1882, against Michael C. Ward and wife, to set aside a voluntary conveyance of two tracts of land which he caused to be made to her on 25th of May, 1874. The conveyance was recorded January 7, 1875.

The debt of appellee was due his assignor before the conveyance was made, and the evidence thereof renewed afterwards.

It appears that the conveyance had no other consideration to support it than that of love and affection.

Seven years, six months and six days had expired from the recording of the deed to the institution of this suit to vacate it, and the appellants pleaded the statute of limitation in bar of the action. Judgment having been rendered against them on that plea they have appealed, asking a reversal on the ground that the lapse of five years from the date the conveyance was recorded is a conclusive bar to appellee's remedy. This position is maintained on the authority of Cotton v. Brown, 3 Ky. Law Rep., 679, in which it was held that a voluntary conveyance having been recorded more than five years before suit, was protected by limitation. But in that case the question of discovery was not in issue and limitation began to run from the perpetration of the fraud, which was completed, as evidenced by recording the deed or legally lodging it for record.

In the present case, however, the appellants having pleaded limitation, the appellee replied that he first discovered the fraud within five years next before he commenced suit, and issue being joined on the time of discovery the burden was upon appellee to establish its date. He introduced evidence which established the fact that actual notice of the conveyance came to him only a few months prior to the institution of this suit.

The appellants rely upon constructive notice proceeding from the registration of the deed as fixing the time of discovery upon the part of appellee. The question, therefore, is, shall constructive notice apply to antecedent creditors and prevail over actual notice in prescribing the period at which limitation begins in favor of voluntary conveyances?

Presumptive notice of the contents of a record is based upon the peculiar policy of the law with reference to such notice which exists in certain, but not in all cases. The recording of conveyances, made in good faith and for a valuable consideration within the time prescribed by the registry laws, is notice to the world of their existence and recordable contents; but where the conveyance is voluntary, its registration is not constructive notice of its existence or contents to a subsequent purchaser for a valuable consideration without actual notice

(Winter, &c. v. Mannen, 4 Ky. Law Rep., 949). As General Statutes, chapter 44, article 1, section 2, declares that only such purchasers with notice of the voluntary alienation or charge shall be bound by it, and that such conveyances are absolutely void as to pre-existing debts, reason, as well as the terms of the statute, require that the same rule should apply to existing liabilities, as to that class of purchasers, when notice is essential to the determination of a right in dispute the holder of such liabilities and the voluntary alienee. Subsequent purchasers, because they deal with the title, are in a better attitude to discover the conveyance than prior creditors, whose transactions have nothing to do with the title to the land.

The purchaser, before he buys, has some reason to look, for he is interested in having a clear title, but the pre-existing creditor has the right to rely upon the condition of his debtor when the debt is created, and unless he be put upon notice he is not bound to keep constant watch over the public records for the voluntary conveyances his debtor may make, else be barred by limitation, regardless of the time of actual discovery or its equivalent. So we think it is clear that, from the terms and true conclusion of the statute, such conveyances do not infect a prior creditor with notice by reason merely of their registration.

The recording of such conveyances is important in establishing the time of the perpetration of the fraud, but it throws but little light of itself upon the question of discovery. It is admissible evidence on that question, and when the manner of its execution and registration and other facts and circumstances in the case would be sufficient to put a person of prudent mind upon inquiry, the law declares this to be notice, because he should have made the inquiry and will be held to have done so whether he did or not (1 Story Equity Jur., section 399). This is a species of actual notice, and does not belong to the constructive notice arising from the fact alone of recording the conveyances. Constructive notice from such fact, where the conveyance is voluntary, arises against volunteers and subsequent creditors, and the conveyance is valid against a subse-

quent purchaser with actual notice, unless the conveyance, in addition to being voluntary, be actually fraudulent.

The doctrine above maintained is supported by authority and the reasonable construction of the statute, and we think it is both sound in principle and practicable in operation (Howard v. Todd, 1 A. K. Marshall, 203; Willis v. Valette, 4 Met., 186; Mueller v. Englen, 12 Bush, 441). The application of the rule of constructive notice to the class of cases named illustrates the force of the rule denying its enforcement against antecedent creditors and bona fide purchasers.

General Statutes, chapter 71, article 3, section 6, provides that "in actions for relief for fraud or mistake or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake."

As the mere fact of recording a voluntary conveyance is not notice of its existence to an antecedent creditor, it must follow that that fact is not evidence sufficient to prove the time of discovery or do more than to prove the perpetration of the fraud, which, as matter of law, is the time the statute begins to run in the absence of allegation and proof by the party attacking the conveyance. That discovery was made within five years next before suit? The remaining point then is, was the evidence sufficient to fix the discovery more than five years prior to the suit. It fails to show that appellee or his assignor had actual knowledge of the conveyance, or that Mrs. Ward was claiming the property unless the collection of taxes from her by the assignor was sufficient to put him upon inquiry. It may be the land was assessed to her by the assessor, but it does not appear that the assignor, who was merely a collector of taxes, had any list of the property assessed by her or knew anything about what she had given in to the assessor, tax collectors being furnished only with the names of taxpayers and the amounts due by each. It is, therefore, plain that he had no knowledge of any fact which made it his duty to examine the records or that would have put him upon inquiry as to her claim.

There is no evidence that the appellee or his assignor had any notice that the title to the land conveyed was charged, incumbered or affected in any way by the claims of Mrs. Ward,

or that they, or either of them, had designedly abstained from inquiry for the purpose of avoiding notice. (Jones v. Smith, 1 Hare, 58; 4 Kent's Comm., 171.)

They could have no motive to avoid notice, for it was to their interest to learn of the fraudulent conveyance as soon as possible, as a failure to discover the fraud for ten years would bar the remedy. None of the facts, therefore, which are usually sufficient to put a party upon inquiry in a legal sense are shown by this record, and we must conclude that the discovery did take place within five years next before the institution of the suit.

The judgment is, therefore, affirmed.

Jno. H. Wathen for appellant.

Geo. S. Fulton for appellee.

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## ELLIOTT v. HARRIS, &c.

(Filed December 13, 1883.)

**1. Examining title—Due diligence—New trial—A brought suit upon a lien note for the purchase price of land, but a defect in the title was set up and a rescission asked on that ground. And A appearing unable to supply the missing deed, the rescission was adjudged. A afterwards discovered the deed and filed his petition, asking a new trial and alleging that during the war the deed books and indexes had been so mutilated that it was impossible to discover the deed except by turning over the pages, leaf by leaf, and that every means but this had been used upon the former trial to discover the deed. Held—That A was not bound to do more than search for the deed in the usual way through the indexes, and that due diligence did not require him to turn over the pages, leaf by leaf.**

**2. Measure of recovery—If judgment is entered for the lien note it should be for interest until maturity and no longer. If rescission is granted the rents should be estimated as equivalent to the interest on the note.**

Appeal from Floyd Circuit Court.

Opinion of the court by Chief Justice Hargis.

Wm. M. Smith at the time of his death owned the land described in this controversy. His only children and heirs were James M. Smith, John W. Smith and the appellant, Mrs. Susan J. Elliott.

On the 3d day of March, 1854, John W. Smith conveyed his interest in the land to his brother, James M. Smith, the deed reciting at its close the words: "I have, together with Jane

Smith, my wife, hereto set my hand and seal," but it was signed alone by him.

It was recorded the day of its date, March 10, 1856. James M. Smith, with the consent of appellant and her husband, sold the land to Bunell Vaughn for $1,000, payable four years from date, with interest from that time, for which he executed his promissory note, and to whom James M. Smith executed a bond for title upon payment of the purchase price and put him in immediate possession, which he held until his death. He left two children, Robert and Jane, who were his only heirs. Jane married Harris. They and their guardian together have been in possession ever since their father's death.

James M. Smith assigned the note to his mother, Mary M. Smith, and died without children, leaving his mother, the appellant, and the children of his deceased brother, John W. Smith, to wit: John and James Speed Smith, his heirs at law.

Bunell Vaughn's administrator paid, at different times, $1,000 on the note, the last payment being made October 29, 1869.

On the 5th of October, 1872, Mrs. Mary M. Smith brought suit against Vaughn's administrator and heirs to recover the remainder of the note, the credits not paying the interest and principal, and to sell the land for its payment.

She tendered the defendants her own deed, the deed of appellant and her husband, not, however, tendering any deed from John and James Speed, children of John W. Smith, deceased.

The defendants resisted a recovery because of a defects of title which they allege was in the infant children of John W. Smith, deceased, and sought a rescission on equitable principles.

John and James Speed Smith refused to join in a conveyance.

Mrs. Mary M. Smith died pending her suit on the note, having willed it and her other property to John M. Elliott and the appellant or the survivor.

The appellant survived him, and he also made her his sole devisee. Thus she became the owner and entitled to recover the proceeds of the note unless John W. Smith's children have some interest in the land or the widow of John W. Smith be living and entitled to dower in the land, and refuses or can not be compelled to convey.

There is no pretense in the record that the widow is living or claims any dower in the land. The infants, John and James Speed Smith, having arrived at maturity a few years ago, attempted to convey, but by oversight or design James Speed signed his name James M. Smith.

Finally it was conceded by both parties that Mrs. Elliott could not perfect the title, neither she nor the appellees knowing that John W. Smith had conveyed the land to his brother, James M. Smith, in 1854, and laboring under this misapprehension, from want of actual notice of its existence, a rescission was decreed at the instance of both parties, and an account of rents and improvements ordered. After the commissioner's report was erroneously confirmed the appellant, for the first time, by accident discovered the deed from John W. to James M. Smith, making good the title. It appears that the deed was recorded in 1854, and that the records of the county are large, covering a period of eighty years; that the appellant and predecessors had not resided in the county since 1861; that during the war the deed book and indexes thereto were so mutilated and torn that no reasonable amount of labor could have discovered the deed, and that every examination was made, except turning over the leaves one at a time to find the deed, but without success. The appellant filed her petition to vacate the judgment confirming the commissioner's report and praying a new trial, in which she alleged the facts recited above, and that she and her predecessors were ignorant of the existence of the deed and had used reasonable diligence without success to discover it as a link in the chain of title to the land. A demurrer was filed and sustained to her petition as amended, and from the judgment dismissing her pleadings she has appealed, and the only question essential to our present inquiry is whether the allegations of the petition as amended are sufficient to exhibit legal diligence in search of evidence which would have produced, or in all probability have produced, a different result from the judgment sought to be vacated.

No amount of diligence in the eye of the law could have discovered the deed, because the law does not require the appellant to do more than search for the deed in the usual way by the aid of the indexes and aid of the clerk, whose duty it is to

index the deed books used by him in recording deeds. He was not bound to turn page by page to find a deed embraced by so cumbersome a record, and she had the right to be content after having made reasonable search and failed to find it. Public authority should provide for indexing the deed books whose indexes are lost or destroyed, and until this be done such books are not entitled to the legal force or validity of public records for the purposes of notice to all who may be affected by their contents. The demurrer should have been overruled, as it admits the truth of the facts alleged, and the appellees required to plead or subjected to confession.

To avoid future litigation we suggest, if a new trial be granted and a rescission be denied, the measure of recovery is the note and interest until it became due and no longer, as the appellant and her predecessors were in default in not making a good title from the time the note became due, and should not, therefore, receive interest during their neglect, failure or inability to convey. Should a rescission be adjudged the rents should be estimated at a sum equivalent to the interest of the purchase price.

Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

Wm. Lindsay and K. F. Prichard for appellant.

J. & J. W. Rodman and Weddington & Goble for appellees.

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At the dinner of the New York Chamber of Commerce, at which Governor Butler, of Massachusetts, and Hon. Jos. H. Choate, one of the leaders of the New York bar, were present, Mr. Choate, in opening his speech, said: "Mr. President, I came here to-night with some notes for a speech in my pocket, but I have been sitting next to General Butler, and in the course of the evening they have mysteriously disappeared (Loud laughter, in which Governor Butler joined). The consequence is, gentlemen, that you may expect a very good speech from him, but a very poor one from me" (Loud laughter). During the delivery of these thrusts, which excited peal after peal of laughter, the venerable object of them simply rubbed the bald spot on his head contemplatively, and looked at the gilded ceiling.—Exchange.

The following decision of Vice Chancellor Simrall involves an important point of practice relating to the right of the court to give a peremptory instruction, and although it is in conflict with a former decision of the Court of Appeals, it undoubtedly takes the correct view of the question. It is important to uphold the functions of the jury, but this is carried too far when the judge is reduced to a mere bailiff, or, at the most, to a higher sort of sheriff put up to preserve order while the jury and counsel between them administer the whole law of the case. The opinion is sustained by the rulings of the U. S. Supreme Court, and, besides those cited, there is another just published (Monclair v. Dana, 107 U. S., 162), to the same effect:

## JEFFERSON COURT OF COMMON PLEAS—VICE CHANCELLOR'S COURT.

## BUFORD v. LOUISVILLE & NASHVILLE R. R. CO.

**1. Premptory instruction—Where the whole case, the pleadings of both parties and the evidence offered upon both sides is so clearly against plaintiff that the court would be compelled to set aside a verdict, if one were returned in his favor, the jury should be peremptorily instructed to find for defendants. (Contra. Thompson v. Thompson, 17 B. Monroe, 28.)**

**2. Compromise—Duress—Plaintiff having been severely injured in a railroad accident, compromised his claim against the railroad the next day and while he was still suffering great bodily pain. As soon as he was able to move he confirmed the compromise by accepting the agreed sum and free transportation home. Held—The mere fact that in making the confirmation he acted under the pressure of great pecuniary distress and anxiety to reach home does not constitute such duress as will avoid the effect of the confirmation.**

Opinion by Judge Simrail.

On the night of the 28d of September, 1882, while the Louisville & Nashville Railroad Co. was transporting the property and employes of the Sells Circus Co. over its Richmond Branch, the train was wrecked near the village of Paint Lick. In descending a steep grade the cars were thrown from the track with great violence, killing severol and seriously wounding others of the employes of the circus company. The plaintiff, Wm. Buford, one of the number, had his leg wrenched from the socket at the ankle joint, which was reset, but some ten days afterwards amputated in order to save the leg, mortification having set in. He brought this action against the defendant to recover $20,000 for said injury on the ground that it resulted

from the gross carelessness of the railroad company in not having sufficient brakes on the cars and in having defective and rotten cross ties on the track.

The defendant answered, first, denying negligence; second, setting up a written contract with the circus company, under which it was claimed that the railroad company only furnished a portion of the cars and the motive power, and that the train was under the control of Sells Brothers; third, pleading a settlement with the plaintiff in bar of the action.

To this answer the plaintiff replied that the pretended compromise was procured the day after the injury when his mind and body were so affected by pain and opiates that the transaction was fraudulent and void. The defendant rejoined, denying the fraud and pleading also ratification or confirmation of the settlement after the plaintiff had been fully restored; all of which is denied by plaintiff in a surrejoinder.

At the conclusion of the evidence on both sides the court gave the jury a peremptory instruction to find for the defendant.

The plaintiff has moved for a new trial on divers grounds, but chiefly because the court erred in giving this peremptory instruction, which we will now consider: First, it is maintained that a motion for a peremptory instruction is in the nature of a demurrer to the testimony, and that upon this motion the absolute truth of all plaintiff's testimony is admitted; and that in considering this motion the court can not weigh the testimony. In other words, can not consider defendant's evidence at all. It matters not how overwhelming the testimony on one side, if there has been any introduced on the other side of the same character the contention is that there can be no peremptory instruction. This seems to the court an entire misconception of the office of a peremptory instruction. It must grow out of a confusion of terms; failing to draw the distinction between a peremptory instruction and an instruction to find as in case of a non suit, which follows upon the conclusion of plaintiff's testimony before the defendant's side has been heard.

But we are confronted by a decision of the Court of Appeals which seems to go the full length claimed by plaintiff. In the case of Thompson v. Thompson, 17 B. Monroe, 28, the court

says: "Our own opinion decidedly and unhesitatingly coincides with that of the circuit judge, that the great weight of the testimony was in favor of the will, and that the preponderance in its favor was so great that had the finding been against the will it would have been his duty to set aside the verdict and grant a new trial, still it was the province of the jury and not of the court to weigh the testimony, and they should have been allowed to do so unfettered by a peremptory instruction. * * The court, in the exercise of its supervisory power over verdicts and in setting them aside, may not inflict such serious injury to the successful party as by a peremptory instruction to find against him."

We confess our surprise at the extreme view taken of this matter by the Court of Appeals, and we are more surprised at the reason given for the conclusion reached. The court goes on to say (page 29): "If his verdict be set aside he will have another opportunity upon another trial of strengthening his case by additional testimony, whereas if he be cut off by a peremptory instruction to find against him, there is an end of the case and he will enjoy no further opportunity of strengthening his proof." (United Society, &c. v. Underwood, &c., 11 Bush, 276.)

Now there can be no doubt that the policy of the law is that litigation shall be speedily ended, and we do not believe that it was ever intended that a complainant should be allowed to experiment two or three times with the court and jury to see whether he can make out a case strong enough to entitle him to a verdict.

Whenever a trial has been had, and both plaintiff and defendant have answered that they have closed their testimony, and have nothing further to offer, it is certain, as a matter of right and law, that either the plaintiff or defendant is entitled to a verdict upon the pleadings and proof as they then stand. It is often difficult for either the court or jury to say in whose favor the verdict should be; but the right exists nevertheless. If, however, upon the whole case the testimony against plaintiff's claim is so overwhelming that a verdict in his favor will not be allowed to stand, then the defendant is entitled to a verdict upon that testimony, and the court should so say. We

are told that the court is usurping the province of the jury in weighing the testimony. Yet the sixth ground for a new trial under the Code of Practice is "that the verdict or decision is not sustained by sufficient evidence or is contrary to law." The court has to determine this question, and how can it be determined except by weighing the testimony, to see if the verdict is "sustained by sufficient evidence?" The real question then is not whether the court has power to weigh the testimony, but when shall the testimony be weighed by the court?

Shall the court wait to set aside the verdict upon motion for a new trial and then subject the Commonwealth and the parties to the annoyance, delay and costs of another trial, or shall the court weigh the testimony at the first trial, and if it finds that plaintiff's claim is not sustained by sufficient evidence, instruct the jury to find for the defendant, and thereby end the litigation? It looks like trifling with justice for the court to go through with the idle ceremony of permitting the jury to bring in a verdict to-day which the court knows it will set aside tomorrow. We are fully aware of the necessity of keeping absolutely distinct the functions of the court and jury, but we believe that nothing is more calculated to bring reproach upon the jury system than a rule which requires a judge to sit as a figurehead upon the bench, and allow juries, under the influence of passion, or prejudice or sympathy, to bring in verdicts which the court knows at the time will have to be set aside because "not sustained by sufficient evidence." We believe the true rule to be that the court should, in the first instance, grant a peremptory instruction in every case, where upon a motion for a new trial the verdict would be set aside as "not sustained by sufficient evidence." That is the rule recognized by the Supreme Court of the United States. In Merchants' Bank v. State Bank, 10 Wall., 604, that court says: "According to the settled practice in the courts of the U. S. it was proper to give the instruction, if it was clear the plaintiff could not recover. It would have been idle to proceed further when such must have been the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates

the province of judge and jury, and fixes where it belongs the responsibility which should be assumed by the court."

In case of Pleasants v. Fant, 22 Wall., 116, the same court says: "Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict should be set aside and a new trial had? Such a proposition is absurd." With the greatest respect for our Court of Appeals, we believe they have carried the rule too far, and hope they will reconsider this question.

2d.—Recognizing the authority of the Kentucky rule in this case, and disregarding the great volume of testimony of defendant to the effect that the compromise was bona fide, we will assume, for the purposes of this motive, that the transaction was fraudulent. Then the question still remains, do the plaintiff's own pleadings and proof show that he subsequently satisfied or confirmed this settlement? Kerr, on Fraud and Mistake, page 296, says: "In order that any act may have any effect or validity, as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately and advisedly, with the intention of confirming a transaction, which he knew, or might or ought, with reasonable or proper diligence, to have known to be impeachable. If his right to impeach the transaction be concealed from him or a free disclosure be not made of every circumstance, which it is material for him to know, or if the act takes place under pressure or constraint, exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be a mere continuation of the original transaction, the confirmation operates as nothing." The terms of the compromise were that in consideration of $100 Buford released the railroad company from all liability, and in addition the company agreed to pay his doctor's bills, and nursing and board, during such time as he was confined to his bed, and then furnish him free transportation to his home in Denver, Col.

The money was left at Paint Lick, the nearest station, in the hands of defendant's telegraph operator, to be delivered to

Buford whenever he called for it. Buford himself says "that after his leg was amputated, and he had recovered from the effects of the drugs and opiates, he learned the defendant had left the $100 mentioned in said paper with its agent at Paint Lick. When he had recovered sufficiently to travel he went to the said agent of the defendant and requested the said agent to furnish him with transportation to this city, but the said agent refused to do so unless plaintiff would accept the said $100. Plaintiff refused to accept the said $100 and defendant refused to furnish him transportation to Louisville. Plaintiff says he had no money and there was no one from whom he could obtain it; that he had lost nearly all of his clothes at the time he was injured, and he was a stranger at Paint Lick and had no friends there, and it was absolutely necessary for him to leave. He says that the agent at Paint Lick of the defendant then told him that if he took the said $100 and came to Louisville the defendant would, upon his arrival here, give him tickets to Denver City, Col., which was then his home. He received the said sum under this duress, and upon that condition, and came to this city over defendant's road." It seems that here are all of the requisite elements of confirmation. Two months had elapsed since the injury, and Buford is fully restored and passed entirely from under the dominion of the opiates and suffering, which had vitiated the original transaction. He evidently knew the precise terms of the settlement, because he had already received the medical attention, nursing and board provided for in the contract, and it only remained for him to receive the money and the transportation to Denver in order to its complete fulfillment. These are the two things about which he begins to negotiate with the defendant's agent immediately upon his restoration.

The result of the negotiation is that he receives the money and free transportation to Louisville with the understanding that he would there be furnished further transportation to his home in Denver. This action was voluntary in contemplation of law. Pecuniary distress does not constitute legal duress. The plaintiff had no right to claim of the Louisville & Nashville R. R. Co. a free transportation to Louisville except under that contract. In order to make the ratification complete it

only remains to inquire whether Buford knew at the time that the original transaction was impeachable? This is manifest from his refusal at first to receive the money, and is made more manifest by his declaration under oath at the trial, when interrogated as to what occurred between him and defendant's agent when he refused to receive the money, he says the agent asked him why he would not take the money, and he replied "because that was not a legal contract." The court is of the opinion that no error was committed in giving the jury a peremptory instruction to find for the defendant. The motion for a new trial is, therefore, overruled.

Emmett Field and J. T. O'Neal for plaintiff.

H. W. & Helm Bruce and Lyttleton Cooke for defendant.

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An Irish lawyer, having addressed the court as "gentlemen," instead of "yer honors," after he had concluded, a brother of the bar reminded him of his error. He immediately rose and apologized thus: "May it plaze the court, in the hate of debate I called yer honors gentlemen. I made a mistake, yer honors." The speaker then sat down.—Central L. J.

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

## Not to be reported in full—Alphabetically arranged according to their subject-matters.

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Assignment of Errors—

1. Where there is no assignment of errors there is nothing for the court to consider, and the appeal will be dismissed. Hamilton, &c. v. Stuart, Rec'r. December 19, 1883. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. Owen & Ellis for appellant; R. W. Slack and E. W. Hines for appellee.
2. Computation of time—Section 681 of the Civil Code must be regarded as fixing the mode of computing time as to acts required to be performed under the Code. The appeal in this case having been granted February 16, 1883, the assignment of error filed May 17, 1883, was in time, being within ninety days, excluding one day and including the other. Smith v. Fowler, &c. December 19, 1883. Hardin Cir. Ct. Opin. by Reid, J., Sup. Ct., overruling mo. to dis. J. P. Hobson for appellant.
3. Separation of conclusions of fact and law—In an ordinary action where there is no statement showing the conclusions of fact and the conclusions of law reached by the lower court, the sufficiency of the evidence to support the judgment can not be considered on appeal, as the court can only consider errors of law in ordinary actions. To reach that question it must be assigned as error that the court refused to set aside its finding, but no such error can be considered unless the finding appears. Helm, Com., &c. v. Dunelly. December 8, 1883. Kenton Cir. Ct. Modified opin. by Bowden, P. J., Sup. Ct., aff. Benton & Benton for appellants; T. F. Hallam for appellee.

Appeal—See Assignment of Errors, 1, 3—

1. Bar—A defendant againt whom judgment has been rendered does not lose the right to prosecute an appeal by voluntarily satisfying the judgment, and when his property has been sold to satisfy the judgment he can exercise his right to redeem without barring his appeal. Figg, &c. v. Richardson. December 7, 1883. Louisville Ch. Ct. Opin. by Richards, J., Sup. Ct., overruling mo. to dis. Burnett & Burnett, John Williams and John Stites for appellants; B. Richardson for appellee.
2. Presumption—The presumption that the decision of the inferior court is correct must prevail unless it affirmatively appears from the record that the decision complained of is erroneous. Gray v. Campbell. December 10, 1883. Fleming Cir. Ct. Opin. by Reid, J., Sup. Ct., aff. W. H. Chord, Cassady & McCarthy for appellant; W. J. Hendrick for appellee.

Bankruptcy—

1. Pleading discharge—The mode of pleading a discharge in bankruptcy is to be determined by the mode of pleading or proceedings in the State courts.
2. Allegations—The plea of a discharge in bankruptcy should allege, in some form, facts which show that the court granting the discharge had jurisdiction both of the subject-matter and of the persons of the defendants.
3. A discharge in bankruptcy may be assailed in any court where pleaded on the ground that the bankrupt court had no jurisdiction to grant it. Landly & Co. v Cummings. December 19, 1883. Kenton Cir. Ct. Opin. by Reid, J., Sup. Ct., rev. W. H. McKoy for appellants; Cleary, Hamilton & Cleary for appellee.
4. Composition agreement does not discharge bankrupt from liability for fraud. Taylor v. Farmer, ante, 487.
5. In pleading composition, should be alleged as made bona fide. Id.

Bastardy—

1. Injunction—The General Statutes undertake to define and regulate all jurisdictions, original and appellate, and, therefore, displace all other statutes upon the subject.
2. Appeal—The General Statutes make no provision for appeals from the judgment of county courts in bastardy cases, either to the circuit court or Court of Appeals, and where an appeal was taken to the circuit court an appeal bond by which the obligors undertook that the defendant would "satisfy and perform the judgment" that might be rendered on the appeal was without validity unless to the extent of the cost on the ineffectual appeal, the circuit court having no power to revise the action of the county court.
3. Sureties—The sureties upon the appeal bond did not become parties to the action by reason of their execution of the bond, and the judgment rendered against them by the circuit court was not merely erroneous, but void. Bramel, &c. v. Commonwealth. December 5, 1883. Mason Cir. Ct. Opin. by Bowden, P. J., Sup. Ct., rev. Whittaker & Robertson for appellants; Wadsworth & Sons for appellee.

Bill of Exceptions—

1. Time for filing—Where time is given until a day in the succeeding term to file a bill of exceptions and the bill is not filed or any order made extending the time until after the expiration of the time allowed the right to file the bill is lost. Louisville & Nashville R. R. Co. v. Turner. December 18, 1883. Edmonson Cir. Ct. Opin. by Hargis, C. J., Ct. of Ap., aff. Porter & Porter and Wm. Lindsay for appellant; Rodes & Settle and E. W. Hines for appellee.
2. Presumptions—Instructions—Where the instructions are not embodied in the bill of exception as signed by the judge, but there is merely a discretion to the clerk to "here insert," designating the instructions by numbers or letters, and in making out the transcript the clerk inserts the instructions in the bill as directed, they will be considered as a part of the record unless the affidavit of one of the parties or his attorney be filed stating that the instructions copied by the clerk are not the instructions directed by the court to be inserted. Arnold, &c v. Hicks. December 19, 1883. Washington Cir. Ct. Opin. by Reid, J., Sup. Ct., motion for subpœna duces tecum overruled. T. C. Bell for appellants; J. W. Lewis for appellee.

Condemnation of Property—

The general statutory mode of condemning property supersedes other modes embraced by charters passed prior to its enactment. Dulaney, &c. v. National Turnpike Road Co. December 20, 1883. Louisville Ch. Ct. Opin. by Hargis, C. J., Ct. of Ap., aff. Barnett, Noble & Barnett and C. B. Seymour for appellee.

Construction of Statutes—See Bastardy, 1; Taxation, 3.

Continuance—

The motion by the defendant for a continuance should have been sustained, the testimony of the absent witness being important and the plaintiff having not had an opportunity since the commencemnt of the action to take his deposition or have a subpœna served on him. Kentucky Central R. R. Co. v. Carey. December 15, 1883. Kenton Cir. Ct. Opin. by Lewis, J., Ct. of Ap., rev. O'Hara & Bryan for appellant; T. F. Hallam for appellee.

Contracts—

1. Suit by third person on contract for his benefit—W. having promised B. to pay money to J., the latter had the right to accept the benefit of the contract and sue upon it in his own name, but W. was not liable directly to J. until notified of such acceptance, and prior the retohad the right to settle the indebtedness with B.
2. Pleading—J. in suing upon the contract, failing to state when he accepted the benefit of it, the filing of the petition must be treated as an acceptance and notice thereof; and the defendant, in pleading payment to B., failing to state the time of the payment, it must be taken to be as of the date of the filing of the answer, and, therefore, subsequent to the notice of the acceptance of the benefit of the contract. Whallen v. Judah. December 5, 1883. Louisville Ch. Ct. Modified opin. by Richards, J., Sup. Ct., rev. Thomas Lawson and Kohn & Baker for appellant; Russell & Helm for appellee.

Criminal Law—

1. In trying a child for felony the court should exclude all improper testimony sua sponte. McClure v. Commonwealth, ante, 468.
2. Evidence of malice in child under fourteen should be strong beyond all doubt. Id.

Deed—

Not recorded for eighteen years, no bar to dower. Lee, &c. v. James, ante, 492.

Defenses—See Usury, 5—

Subrogation—A trustee who was required by the deed of trust to pay to the beneficiary of the trust the interest on the trust fund, instead of paying the interest, loaned to the beneficiary a certain amount of the trust money, for which she executed her notes and a mortgage on a lot of ground to secure their payment. A creditor of the beneficiary had an execution levied upon the lot, subject to the mortgage, and in an action by him to enforce his lien the trustees ought to foreclose his mortgage for the amount loaned, with interest. The mortgagor failed to claim the interest on the trust funds, to which she was entitled under the deed of trust, and the property being insufficient to satisfy both lines, it is held that the execution creditor has the right to set up in the mortgagor's place her claim to interest on the trust fund. Chinn, Trustee, &c. v. Crutcher, &c. December 6, 1883. Franklin Cir. Ct. Opin. by Hargis, C. J., Ct. of Ap., aff. W. P. D. Bush for appellants; Geo. C. Drane for appellees.

Deposition—

Exceptions—Where there are exceptions to a deposition as a whole they should be overruled if any part of the deposition is competent. Hedger, &c. v. Reed. December 19, 1883. Harrison Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. J. Q. Ward for appellants; A. H. Ward for appellee.

Descent—

Vendor and vendee—Death of vendor—A father sold to his son-in-law a tract of land and executed to him a bond for title. The father died before the son-in-law finished paying for the land and the legal title passed to his children.

Held—That the interest of the vendee's wife, the daughter of the vendor, is to be measured by the unpaid purchase money. She is not entitled to a child's share in the entire tract, but only in a part of the land measured by the proportion the unpaid purchase money bears to the whole, and her husband had no power to divest her of this interest by crediting his purchase-money notes with its value. Litsey v. Phelps, &c. December 6, 1883. Washington Cir. Ct. Opin. by Pryor, J., Ct. of Ap., rev. P. B. Thompson, Jr., for appellants; A Duvall and R. J. Browne for appellees.

Dower—

1. Equitable title—Where the husband dies the equitable owner of land by reason of an executory contract the wife is entitled to dower, and the transfer by operation of law to the assignee in bankruptcy of the husband is not such a disposition of the equitable title as to deprive the wife of dower. Lane v. Judy, &c. December 4, 1883. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. of Ap., rev. Tyler & Hazelrigg for appellant; Holt & Reid for appellees.
2. No dower against lien for purchase money. Lee, &c. v. James, ante, 492.
3. Dower should be assigned in kind and not by its cash value. Id., 492.
4. Deed not recorded for eighteen years, no bar to dower. Id., 492.

Due Diligence—

Sufficient to examine indexes in searching for deed, not required to go through deed books. Elliot v. Harris, &c., ante, 499.

Election—

1. Notice of appeal in election case need not be as full as a petition. Raney v. Ratcliff, ante, 471.
2. such appeal should be placed on equity side of docket. Id.

Estoppel—See Executions, 1—

One of the defendants in an execution, who was merely a surety, was not cut off from any valid defense he had to the execution by reason of the fact that he received an indirect benefit from a contract between the plaintiff and the principal debtor, whereby the latter agreed to pay the execution, which had been levied, within a certain time. Commercial Bank, &c. v. Trimble, &c. December 19, 1883. McCracken Cir. Ct. Opin. by Reid, J., Sup. Ct., aff. Q. Q. Quigley for appellants; J. M. Bigger for appellees.

Evidence—See Wills, 1—

1. Proposed compromise—It was not competent for the plaintiff to prove for any purpose the loose declarations of one of the defendant's witnesses as to a compromise proposed by the defendant, the witness making the declaration being in no way authorized to speak for the defendant in regard thereto.
2. Private examination of personal injuries—Even if if it was necessary that in an action against a railroad company for injuries received by the plaintiff she should submit to a private examination of her person, physicians introduced as witnesses for the defendant were not the proper persons to make the examination. Kentucky Cent. R. R. Co. v. Carey. December 15, 1883. Kenton Ct. Ct. Opin. by Lewis, J., Ct. of App., aff. O'Hara & Bryan for appellant; T. F. Hallam for appellee.

Executions—

1. Levy—To constitute a good levy upon real estate the officer should go upon, or to, the premises and make an actual levy, or see the defendant in the execution, or his agent, and obtain his consent that the execution be levied upon the estate sought to be subjected, or he should see and apprise the defendant or his agent of the particular estate upon which he designs levying, and thereupon make an official and specific entry upon the execution, or upon a paper thereto attached, of the estate and levy.
2. Conclusiveness of judgment—The judgment in an action against a sheriff and his sureties for failing to make a proper levy of an execution that the levy is good does not estop the defendant or his representatives from questioning the sufficiency of the levy, he not being a party to the action against the sheriff. Demint v. Ringo's Adm'r. December 19, 1883. Carroll Cir. Ct. Opin. by Richards, J., Sup. Ct., rehearing granted and aff. T. J. McElrath for appellant; Winslows for appellee.

Fraud—

1. Committed by suppressio veri. Taylor v. Farmer, ante, 487.
2. Compromise of a claim against a railroad for damages for personal injuries made when the party is in pecuniary distress is not for that reason fraudulent. Buford v. L. & N. R. R. Co., ante, 503.

Frauds, Statute of—

A perpetual lease is real estate, and an oral contract for such a lease is within the statute of frauds. Therefore, in an action by the owner of land to recover the sum agreed to be paid by another for perpetual lease of the land, in the event he should elect to take the lease, it was error to admit oral testimony to prove his election, the only writing being a paper signed by the owner of the land himself to make the case upon the election of the defendant to take it, and the payment by him of the sum stipulated. Judge, &c. v. Cash. December 19, 1883. Lyon Cir. Ct. Opin. by Bowden, P. J., Sup. Ct., rev. C. B. Seymour for appellants; Daniel B. Cassidy and J. G. Husbands for appellee.

Garnishee—

Pleading—Where a garnishee is made a defendant for the purpose of obtaining a personal judgment against him, the cause of action must be alleged with the same particularity as if he were being sued thereon by

the principal debtor. Murphy, &c. v. Nelson County Court. December 7, 1883. Nelson Cir. Ct. Opin. by Reid, J., Sup. Ct., aff. J. H. Thomas & J. C. Wickliffe for appellants; John H. Wathen, Wm. Johnson and J. D. Wickliffe for appellees.

Guardian and Ward—

Deposit—Interest—The fact that a guardian deposited money of the ward in bank to his own credit is not sufficient to charge him with interest, although he would have been compelled to have sustained the loss if any had occurred while it was so deposited. Hedger, &c. v. Reed. December 19, 1883. Harrison Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. J. Q. Ward for appellants; A. H. Ward for appellee.

Husband and Wife—See Descent—

Use of wife's realty—During the marriage the husband is entitled to the use and rent of the wife's real estate, and being rightfully in possession, he may have there such inmates as it pleases him to have. The court properly sustained a demurrer to a petition of the wife seeking to evict the husband's guests. Ashley v. Ashley, &c. December 3, 1883. Clark Ct. of Com. Pleas. Opin. by Bowden, P. J., Sup. Ct., aff. L. Hathaway for appellant; T. S. Tucker for appellees.

Injunction—

Grounds for—To justify the interference of a court of equity in restraint of a trespass the plaintiff's title must be established and facts pleaded showing that the injury complained of is irreparable in its nature, not susceptible of adequate pecuniary compensation in damages. Mere insolvency of the defendant is not a ground for an injunction.

The petition in this case, showing only an entry upon the plaintiff's land for the purpose of raising a crop, does not authorize an injunction. Watson v. Holmes, &c. December 19, 1883. Robertson Ch. Ct. Opin. by Reid, J., Sup. Ct., rev. W. Buckler for appellant; Thomas Owens for appellees.

Insurance—

1. Paid-up policy—The representation by an insurance company to the insured that the policy after a certain time would be nonforfeitable, and that at any time thereafter the company would issue him a paid-up policy, is binding upon the company, and a stipulation in the policy that it shall cease and determine upon the failure to pay any premium at the stipulated time, and that the previous payments made shall be forfeited to the company, is not in conflict with these representations.
2. Time not essential—Under an agreement by an insurance company to issue a paid-up policy if, thirty days after default in the payment of any premium, the policy shall be surrendered, the company is bound to issue the paid-up policy, although the old policy be not surrendered within thirty days, time not being of the essence of the contract.
3. The stipulation in a note executed by the insured for a premium that the policy should cease and determine fully on default in payment of the note at maturity, did not deprive the insured of his right to a paid-up policy upon his failure to pay the note when due, the right thereto hav-

ing accrued before the execution of the note. Southern Mut. Life Ins. Co. v. Montague, &c. December 19, 1883. Taylor Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Rountree & Lisle for appellant; R. S. Montague for appellees.

4. Acts of agents—Insurance companies are liable for the acts and representations of their agents whenever parties dealing with them are justified in supposing the agent was authorized to do the act or make the representation in question.

5. The insured has the right to rely upon instructions given him by the agent issuing the policy as to whom and where the premiums shall be paid, the contract being silent upon the subject.

The insured in this case had the right to rely upon the direction of the agent not to pay the premiums in any other way than as directed by the general agent in Chicago, from whom the agent informed him he would receive notice before each installment should fall due directing him how, where and to whom he should make the payment, as neither the policy nor installment note fixed definitely the place of payment or the officer or agent to whom the payment should be made. A printed direction on the back of the policy to address all communications relative to the policy to a certain person was not a part of the contract or a direction to make the payments to that person.

The insured failing to receive any direction as to whom he should make the payments, is not in default for his failure to make them.

Blackerby v. Continental Ins. Co. December 19, 1883. Henry Cir. Ct. Opin. by Richards, J., Sup. Ct., rehearing granted and rev. Carroll & Barbour for appellant; J. D. Carroll for appellee.

Limitation, Statute of—See Voluntary Conveyance. 2, 3—

Plea that a party has stopped the running of the statute by indirect means must state especially, not generally, by what indirect means. Phillips v. Shipp, &c., ante, 461.

Partnership—

1. Sale of partnership goods—In a partnership composed of only two members one of them can not make a valid disposition of partnership property against the protest of his partner to a purchaser who has notice of the facts. Babcock & Son v. Deposit Bank. December 3, 1883. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Owen & Ellis for appellants; Sweeney & Son for appellee.

2. To establish partnership it should appear either that the parties sought to be charged as partners stood toward each other in the relation of principal and agent, acting by the authority of each, or that they have so conducted themselves in reference to the business as to estop them from denying that they were partners.

3. Compensation of partners—In general partnerships where there is no special agreement as to the services to be rendered by the partners respectively the presumption is that each is to do what he can for the common benefit, and no one of several partners is entitled to compensation for services to the firm without a special agreement. Boyd, &c. v. Tabb, &c. December 5, 1883. Mason Cir. Ct. Opin. by Reid, J., Sup. Ct., rev. Wadsworth & Son and Thos. H. Curran for appellants; Barbour & Cochran for appellees.

Personal Representative—

1. Pleading—In an action upon an administrator's bond by a distributee of the decedent's estate the petition should allege that the plaintiff is a distributee. An allegation that in an action by the administrator to settle his accounts it has been adjudged that the plaintiff is a distributee is not sufficient. Such a judgment against the administrator is not conclusive against the surety as to the persons entitled to the surplus assets, even though it be conclusive as to the amount.
2. Pleading—The allegation in the petition that the administrator executed bond with the defendant "as his surety" is not sufficient to authorize a judgment against the surety upon the bond. Helm, Com'r. &c. v. Donnelly. December 3, 1883. Kenton Cir. Ct. Modified opin. by Bowden, P. J., Sup. Ct., aff. Benton & Benton for appellants; T. F. Hallam for appellee.
3. Power to sell—Where a testator by his will directs that land be sold, and no other person is directed to sell, the executor is empowered to sell and convey, and has the discretion as to the time, manner and terms of sale. McCulloch v. Sanders' Ex'or. December 6, 1883. Louisville Ch. Ct. Opin. by Lewis, J., Ct. of Ap., aff. A. P. Humphrey for appellant; J. S. Pirtle for appellee.

Pleading—See Bankruptcy, 1, 3, 5; Garnishee, 1; Limitations, Stat. of, 1; Personal Representative, 1, 2—

1. Cross petition—The Code does not authorize a cross petition by a plaintiff against a co-plaintiff except upon a cause of action which affects, or is affected by, a set-off or counterclaim. Ewing v. Kilso, &c. December 7, 1883. Oldham Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. B. S. Robbins for appellant; Joseph Clore and Carroll & Barbour for appellee.
2. Several facts conjunctively denied, the denial is not sufficient as to either. Taylor v. Farmer, ante, 487.

Practice in Civil Cases—See Depositions, 1—

1. An objection and exception made to an order striking out a part of the plaintiff's petition was not equivalent to an objection to the motion to strike out, which is necessary. Hedger, &c. v. Ried. December 19, 1883. Harrison Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. J. Q. Ward for appellants; A. H. Ward for appellee.
2. Failure to file pleading in time—The failure to file a pleading at the time prescribed by the court is not an absolute forfeiture of the right to plead further. The pleading may still be filed by leave of court.
3. Transfer of legal issue to ordinary docket—In an action upon a promissory note secured by mortgage seeking judgment upon the note and a foreclosure of the mortgage, the defendant having pleaded various matters of set-off amounting to more than the amount of the note, and the issue being as to whether they existed or not, the court properly sustained the defendant's motion to transfer this legal issue to the ordinary docket, the exercise of equity jurisdiction being dependent upon the result of the legal issue. Williams, &c. v. Pidgeon. December 10, 1883. Ballard Ct. of Com. Pleas. Opin. by Bowden, P. J., Sup. Ct., aff. Nichols & Hawes for appellants; J. W. Bugg, J. D. White and W. Lindsay for appellee.

4. Failure of lower court to conform to mandate—The Court of Appeals not having fixed by its opinion the measure of damages directed to be assessed or the mode of inquiry for the purpose of ascertaining the damages, has no power over the chancellor with regard thereto. If there is any error in the final judgment for damages the remedy of the party aggrieved will be by appeal. Avery & Sons v. Meikle & Co. December 20, 1883. Lou. Ch. Ct. Opin. by Pryor, J., Ct. of Ap., overruling motion to require chancellor to conform to mandate. W. O. & J. L. Dodd, John Mason Brown, P. B. Muir and John Marshall for appellants; W. Lindsay, Geo. M. Davie and J. S. Pirtle for appellees.
5. Peremptory instruction when proper to be given. Buford v. L. & N. R. R. Co., ante, 503.

Railroads—See Fraud, 2; Taxation, 5—

1. Injury from escaping sparks—Those owning and operating railroads are not liable for injury done by the escape of sparks of fire from locomotive chimneys, except where they fail to apply or use the appliances for preventing it, required by the act of January 30, 1874.
2. Evidence—In an action under the act, the plaintiff being obliged to resort to circumstantial evidence to show the origin of the fire, it was competent for him to show that trains frequently set fire to fences and grass at other places in his vicinity about the time of the injury to his property, and that the train usually passed with the screen or fender up or laid back. Kentucky Central R. R. Co. v. Barrow. December 4, 1883. Clark Cir. Ct. Opin. by Lewis, J., Ct. of Ap. O'Hara & Bryan for appellant; Haggard & Jones and H. L. Stone for appellee.

Records—

Conclusive—The Court of Appeals can not go outside of the records to try an issue as to the verity of the records of the lower court. Therefore, where the record does not show that an order was made by consent appellate court can not hear testimony showing that it was so made. Louisville & Nashville R. R. Co. v. Turner. December 18, 1883. Edmonson Cir. Ct. Opin. by Hargis, C. J., Ct. of Ap., aff. Porter & Porter and W. Lindsay for appellant; Rodes & Settle and E. W. Hines for appellee.

Rescission—

What rents are recovered where sale of land is rescinded. Elliott v. Harris, ante, 499.

Roads—

Appeal from an order of county court in reference to may be taken within one year. Kimble v. Leisher, ante, 467.

Sales—

Titles—Delivery—In a contract to manufacture and ship goods worth a certain amount the title did not pass to the purchaser until the act of shipping contemplated by the contract had been commenced. The manufacture, marking and setting apart of the goods was not sufficient to pass the title. Babcock & Son v. Deposit Bank. December 3, 1883. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Owen & Ellis for appellants; Sweeney & Son for appellee.

Set-Off—See Usury,

**Sheriff—**

Payment of claims in excess of levy—When a sheriff or collector of the county levy, in paying the designated county creditors, exceeds the amount of the levy laid the law does not imply a promise on the part of the county to reimburse him for the excess. His remedy, if any, is by substitution to the rights of the county creditors to be paid out of subsequent levies. Murphy, &c. v. Nelson County Court. December 7, 1883. Nelson Cir. Ct. Opin. by Reid, J., Sup. Ct., aff. J. H. Thomas and J. C. Wickliffe for appellants; John H. Wathen, Wm. Johnson and J. D. Wickliffe for appellee.

**Taxation—**

1. Water companies—Water companies are subject to taxation by the express terms of the statute, and can not claim exemption by reason of the public benefits which they confer.
2. Retrospective statutes—An act of April 22, 1882, providing that "the Louisville Water Co. is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal and special," does not release the company from the payment of taxes due at the time of the passage of the act. Whether the act exempting the company from future taxation is unconstitutional is not necessary to be decided.
3. An act will not be construed to be retrospective unless such is the plain legislative intent.
4. Collection of taxes—The property of a water company necessary for its use, like a turnpike or railroad, can not be seized or sold by a collecting officer, and the chancellor having been appealed to by the appellant for relief, should require the company to pay the taxes into court; and, upon its failure to do so, place the management of the corporation in the hands of a receiver until the tax is paid, unless it appears that the land owned by the company is not necessary to its operations, and in that event the chancellor should direct the sheriff to sell it. Louisville Water Co. v. Commonwealth. December 20, 1883. Lou. Ch. Ct. Opin. by Pryor, J., Ct. of Ap., rev. T. L. Burnett, Russell & Barret and Brown & Davie for appellant; Russell & Helm for appellee.
5. The act creating board of commissioners to assess railroads for taxation is constitutional. Railroad Tax Cases v. Commonwealth, ante, 445.
6. City can tax a bridge extending from its limits across Ohio river to Indiana Shore. Louisville Bridge Co. v. City of Louisville, ante, 473.
7. Contra. Id., 484.

**Usury—**

1. Forfeiture of interest—Since the repeal of the statute providing for the forfeiture of the entire interest where more than the legal rate was contracted for, the borrower is responsible for the amount loaned with "legal interest," although he contracted for a greater rate while the statute was in force.
2. Legal interest—Under the conventional interest law 10 per cent. was not "legal interest" unless that interest, and no greater, was contracted for in writing. Therefore, where more than 10 per cent. was contracted for under that law only 6 per cent. can now be recovered.

3. Special privilege—The provision in the charter of a corporation allowing it to charge a greater rate of interest than is allowed by the general laws is unconstitutional.

A contract to pay 10 per cent., and in addition thereto "a premium" for the loan, was a contract for more than 10 per cent.

4. The appellee having elected to cancel the appellant's stock because of his failure to comply with the conditions attached to his subscription, and to treat the payments made by the appellant thereon as payments on the notes sued on, those payments should be credited as of the date they were made. Mack, &c. v. Workingmen's Building and Loan Association. December 5, 1883. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. Wharton & Ray for appellants; M. A. & D. A. Sachs for appellee.

5. Set-off against judgment—When the defendant has failed to plead usury, known to him at the time of the rendition of the judgment, the mere existence of the usury is not a ground for the modification of the judgment, but when the plaintiff has subsequently become insolvent the defendant may set-off the usury against the judgment, instead of paying the usury and resorting to a distinct action to recover it. Commercial Bank of Ky., &c. v. Trimble, &c. December 19, 1883. McCracken Cir. Ct. Opin. by Reid, J., Sup. Ct., aff. Q. Q. Quigley for appellants; J. M. Bigger for appellees.

Voluntary Conveyance—

1. Not effectual against existing debts. Phillips, &c. v. Shipp, &c., ante, 460.
2. Must be attacked within ten years from its date. Id.
3. Limitation runs against from time of actual notice, not from time of recording. Ward v. Thomas, ante, 495.

Wills—

1. Introduction of testimony—In contested will cases the burden of proof as to capacity being upon the propounders, they should be allowed some latitude in determining what amount of evidence will make out a prima facie case and shift the burden from them, but they should be required to finish if the evidence introduced shows an effort to prove more than a prima facie case. The introduction in chief by the propounders of the original draughtsman of the will as to the testator's capacity, in addition to the subscribing witnesses, did not bar them from introducing other testimony in rebuttal on that subject.
2. Sound mind—An instruction defining "sound mind" in accordance with the cases of Tudor v. Tudor, 17 B. M., 883, and Elliott's will, 9 J. J. M., 340, are approved. Watson, &c. v. Warnock, &c. December 15, 1883. Greenup Cir. Ct. Opin. by Hargis, C. J., Ct. of Ap., aff. E. F. Dulin, T. H. Paynter, B. F. Bennet, W. H. Wadsworth and Roe & Roe for appellants; L. T. Moore and W. Lindsay for appellees.

THE

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## CURRENT TOPICS.

Mr. Davis, the newly-appointed Reporter of the United States Supreme Court, announces that hereafter the reports will be published in advanced parts. Each part is to consist of 100 pages issued on the first and fifteenth of the month. This is a great improvement on the old plan by which the decisions were not delivered to the profession until a year or more after they were delivered.

The subject of relief to the Courts of Appeals is one of very general interest throughout the whole country, and reaches even into Canada. Nearly every apellate court closes its docket at the end of the year with a large number of cases undecided and the deficit annually increasing. The dissatisfaction among litigants is universal, and yet it does not appear that the judges are in fault. The number of cases annually decided, bears a fair proportion to the number argued. What then is to be done? The fact remains that decisions are delayed, cases are kept pending on appeal until the benefit of judgment to the party in right is materially reduced, and justice is thereby denied. But celerity in the dispatch of business is not the only desirable thing in a court. Exactness and

correctness of decision are not less important. The litigant is entitled to the deliberate and well-informed judgment of the court, and this can be had only by giving the court ample time to reach such judgments. But suppose the number of judges were increased—say doubled—and the court divided into two sections of four judges each; the cases allotted one-half to each section with the right to refer all constitutional questions or points of peculiar difficulty to the full court composed of both sections. In this way the work of four judges would be just one-half what it is now, and the litigant would still have the judgment of the same number of judges on his case. This is similar to a suggestion made in New York for the relief of the Court of Appeals of that State. The number of judges there to be twelve, to be divided into four sections of three judges each, one section to have charge of all questions of real property, another of contracts, a third of criminal law, and the fourth of other questions. This plan of making each section a specialist has its advantages.

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The London Law Times says: "It is satisfactory to know that his American observations have not inspired Lord Coleridge with any desire for further drastic legal reforms. The master of the rolls announced at the Mansion House that nothing of the sort is to be immediately apprehended. Great as are the arrears in the English Court of Appeal, he said those in America are three times greater. It may, therefore, be hoped that procedure will be left alone for the present.

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An interesting question is decided by the Sup. Ct. of Michigan in Engeln v. Chipman, October, 1883. Plaintiff sued to recover for his services as attorney rendered at the instance of defendant, who was Commonwealth's attorney, and had employed plaintiff to represent the Commonwealth in certain cases in which he himself could not appear. It is held that such a contract is illegal. The Commonwealth's attorney has responsible duties to perform which constitute a trust personal to himself, and can not be delegated to another. Nothing can be recovered on such a contract.

A wife having been deserted by her husband without fault on her part, and left with no means of providing for her own or her children's support, has implied authority to sell the personal property of her husband. This proposition was laid down in a recent case, Rawson v. Spangler, decided by the Iowa Supreme Court. The same thing has perhaps never been held before; at least authorities are cited by the court, but it seems no great distance ahead of the common law doctrine that under similar circumstances the wife has implied authority to use her husband's credit. Suppose his credit will not obtain necessaries unless property is pledged as collateral security? Ought she to be allowed to starve for want of power to make the pledge, and if she has the power to pledge, she must have, of necessity, power to sell, otherwise the pledge would be of no value to the lender. He must have the power to convert it into money upon failure to repay the loan.

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There seems to be a disposition on the part of courts of review in this country to examine the instructions of the trial court with great nicety, and to reverse for slight errors of phraseology in stating some abstract proposition of law, so that it is almost impossible to present a series of instructions for review where some technical inaccuracy or mistake will not be discovered and the case reversed on that ground. And yet it is the general observation of practitioners that instructions have little weight with or control over the jury. They are laid aside as soon as given, and rarely alluded to in the speeches of counsel. It seems that no case should be reversed on account of the instructions unless a careful consideration of the evidence shows that appellant's rights have been injured. It is not sufficient that the instructions are insufficient as legal propositions. An interesting article on this subject appeared in a recent number of the Chicago Legal Adviser, from which the following is copied:

"Many persons are of the opinion that judges ought, under our present system, to write out their charges to the jury, and dispense with such a voluminous mass of instruction as is now given on behalf of each side, contending that, by the present

practice, juries are more frequently confused and led astray than in any other way. It is undoubtedly true that in very many instances juries look upon the instructions which are first read to them, on behalf of the plaintiff and then on behalf of the defendant, more as mere catches and conundrums than anything else, and they seem to think that they are matters for the lawyers rather than themselves, and so disregard them altogether, and proceed to discuss the question as to who is entitled to the verdict."

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It is held in Sides v. Knickerbocker Life Ins. Co., by U. S. Cir. Ct., W. Dist. Tenn., that where the person who takes out the policy has at the time an adequate insurable interest in the life of another, the policy is valid and recovery can be had on it, although the interest ceases before the death of him on whose life the policy was issued, e. g. where the lessee takes out a policy on the life of his landlord who has only a life estate in the premises and the lease terminates before the landlord dies, the tenant may nevertheless recover the full amount of the policy upon the death of the landlord, whenever it happens.

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Where the widow is insane, can any one else elect in her behalf to receive the provision of the will in lieu of dower, was the question before the Sup. Ct. of Wis., in Van Steenwyck v. Washburn. The statute was general in its terms, and made no exception in favor of the insane widow. It is said by the court that in construing statutes "general words are to have a general operation which affords grounds for qualifying and restraining them. No exception can be claimed in favor of particular persons or classes unless they are expressly mentioned. The doctrine of an inherent equity creating an exception where the statute has made none can not be sustained."

This all reads very much as if the court would hold that the widow and no one else must make the election; but their conclusion is that the court of equity may act for her, she being insane.

A similar question arose in this State in the well-known case of Smithers v. Smithers' Ex'or, 9 Bush, 230. Judge Pryor held that although our statute requires the widow to elect between dower and a devise made her under her husband's will within twelve months, yet she may make the election after the expiration of the twelve months in a case where suit has been brought to settle the estate and no accurate idea can be formed of its value; if certain claims were allowed it would be insolvent; if they were rejected the devise would far exceed the value of the dower. She was, therefore, allowed to await the determination of the suit for the settlement.

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The U. S. Sup. Ct. has very recently been called on again to apply the constitutional provision against impairing contracts, and has again construed it to the disadvantage of the public debtor. In Louisiana v. Mayor of New Orleans, A had obtained judgment against the city for injuries to his property at the hands of a mob, and at the time of obtaining the judgment the city had power to impose and collect a tax sufficient to pay the judgment, but before it was collected the State, by statute, so reduced the taxing power of the city that it was unable to satisfy the judgment. It was claimed that the statute interfered with a contract and was, therefore, unconstitutional. But the court said the action was founded upon a tort, and though the claim had been reduced to judgment, its character, as based on a tort, was unchanged; that the common-law idea that a judgment was a contract rests on a mere fiction, the judgment lacks the essential of a contract, agreement of the minds of the parties, and, is, therefore, not within the protection of the constitutional provision against impairing contracts. It is said also that the 14th amendment was not violated since the judgment creditor is not deprived of his property in the judgment so long as it continues an existing liability against the city.

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A recent decision of the English Court of Appeals holds that where A agrees not to carry on a certain business within a certain area at any time during his life, the contract is valid, for

though indefinite in time it is limited as to area. It is binding although the person with whom the contract was made should remove his place of business, should assign it or retire from business without assigning it. Such an agreement passes on the assignment of the good will of the business to the assignee, and may be enforced by him. (Jacoby v. Whitmore, July, 1883.)

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Mr. John D. Lawson has a very interesting article in the Alb. Law Journal, No. 725, on the subject of the "Presumptive Validity of Judicial Acts," written out in the style of Sir James Stephens' admirable little book on Evidence, with the propositions stated in the form of rules, accompanied by illustrations drawn from decided cases. The rules are very concisely, but clearly stated. They are, first, where a court having general jurisdiction acts in a case its jurisdiction to so act will be presumed; second, but when the act is one of an inferior court, or is done under a special authority granted to any tribunal in a special case, or is not according to the course of the common law, the jurisdiction is not presumed but must be shown; but he adds (in rule 3) that the jurisdiction of the court being once shown to exist, all its proceedings in the case are presumed to have been regular, and this applies to courts of inferior as well as to those of general jurisdiction. Thus where the record in a criminal case in the circuit court did not show whether the charge of the judge was given orally or in writing, the law required it should be in writing. Held—The presumption is that it was in writing; so where the jurisdiction of a probate court to render a certain judgment was conceded, the question being whether the proceedings were regular, the presumption is that they were; and where lands of an infant were ordered sold by the circuit court, but a bill was filed to set aside the sale, the record showing that process was ordered against the infants and a guardian ad litem appointed, the presumption is that the infants were regularly before the court; fourth, but where the record shows that the defendant was a nonresident, it can not be presumed that the court had jurisdiction of the case; fifth, a presumption can not contradict facts averred or proved. If, for example, it appears that

process was served on a person other than the defendant, it will not be presumed, in the silence of the record, that it was made on the defendant also.

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The common law was very particular to hold innkeepers to a strict accountability for any loss that happened to a guest of the inn. For in former times the inns were kept in lonely places on the public highways exclusively for travelers and wayfarers who stopped over night for food and lodging, and being strangers and friendless the innkeeper was held responsible for any loss to them almost to the extent of insuring them against loss. But when the inn disappeared and the modern city hotel arose, where the guest is as often a permanent resident as a stranger, a modification was placed on the common law rule and it was held that the keeper of the hotel was not liable for loss to his regular boarders as to his transient guest. This qualification of the former rule is discussed by the New York Court of Appeals in General Hancock's case, lately decided, Hancock v. Rand, where it appeared that plaintiff, being a general in the army with no fixed residence anywhere, but liable to move at any time upon orders from the government, engaged rooms for himself and family at the hotel of defendant, in the City of New York, at a fixed monthly price, with the understandng that if he was pleased and was not sooner ordered away he would keep the rooms until the following spring. While he remained under this arrangement valuables belonging to him were stolen from his room. In an action to recover their value of defendant it is held that the plaintiff was not a regular boarder, for he had not definitely engaged the rooms for a fixed time, but was bound to remain only so long as he was pleased or until he was ordered away with the army, and, therefore, defendant was liable for the loss. This recalls the case of Vance, &c. v. Throckmorton, &c., 5 Bush, 41, where appellees, being regular boarders at the old Galt House in Louisville at the time it was destroyed by fire in 1865, brought an action to recover for their jewelry and rich wardrobe, consisting of as (enumerated by the court) "albums, opera glasses, hair braids, water falls, etc., etc.," all destroyed by the fire. The court held there could be no recovery because the appellants were regular boarders, and, be-

sides, the loss having been occasioned by fire, the innkeeper should not be liable unless it appeared that the fire was caused by his negligence. It was held that the innkeeper is never liable for more than the ordinary traveling paraphernalia or baggage of his guest and not for merchandise, such as silver, knives, forks, etc.

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Where a railroad company is required to fence its line in order to shield itself from liability for killing stock, it can not be charged with negligence for not providing convenient places for animals to leave the track after coming upon it. (Gilman v. Sioux City, &c., R. R. Co., Ia. Sup. Ct., 17 N. W. Rep., 520.)

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Leaver v. Gauss, Ia. Sup. Ct. 17 Id., 522, presents an interesting question. A deed which recites that "the grantee is to take no estate during the lives of the grantor" is testamentary in its character, and even if a consideration was paid for it, may be revoked; the words quoted exclude the grantee from any estate, either vested or contingent, for if the grantee were allowed even an estate in remainder, he would then be taking an interest in the land, merely the enjoyment being postponed until the death of the grantor. The deed was testamentary in its character, being a provision for the grantee after the death of grantor, and might, therefore, be revoked like a will at any time.

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Where a will has been expressly revoked by a later will nothing can ever be claimed under it, though the latter will should be lost or destroyed. (Stevens, &c. v. Hope, &c., 17 N. W. Rep., 698.)

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The difficulty between the railroads in the east pooling their earnings and the Delaware, Lackawanna and Western road which refused to join the pool threatened to be brought up last month into the courts for settlement. The pool roads gave

notice they would no longer make connections with the Lackawanna, or deliver freight to it to be forwarded by it over its own line or receive freight from it to be forwarded over their lines. The Lackawanna was preparing to ask an injunction against such measures when the matter was compromised by Mr. Gould at the last moment, and temporarily kept out of the courts. The pool has been very advantageous to the stockholders of the railroads, as it prevents ruinous competition and cutting of rates by rival lines and secures to the capital invested regular dividends, but it is questionable whether the courts would sustain any such extreme step as that proposed by the pool roads in this instance. In a case very recently decided by Judge Baxter in the U. S. Cir. Ct., at Cincinnati, McCoy v. C., I., St. L., &c., R. R. Co., 22 Am. Law Reg., 725, it is said that railroads are public corporations, at least in a qualified sense; they exercise the public right of eminent domain and take private property for their own uses, so the law imposes duties on them, one of which is to deal fairly and impartially with all patrons, provide adequate facilities for and to transport all business that offers. In the contest a few years ago between the express companies and the railroads it was held that the railroads could not refuse to receive and transport freight tendered by the express companies, although the roads themselves were ready and desirous to carry on an express business and did not wish to encourage a rival. They must furnish to the express companies suitable cars for their freight, and transport it in a manner suitable to the public convenience, i. e., upon passenger trains and under charge of the express companies' own messengers. (J. J. Miller and McCrary in Louisville Express Co. v. Nashville, &c., R. R. Co., 20 Am. Law Reg., 590.) If these principles are correct, it is not perceived how the pool lines could have refused to receive freight from or deliver it to the Lackawanna. The courts seem very determined to make the roads reciprocate to the public the various benefits which they have received from the public. The English cases, which are very interesting, will be found collected in a note to the McCoy case, supra.

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The following, copied from the London Post, will be read with interest as showing the point from which our criminal

law has advanced and the extent to which the rights of the accused have developed. It is apropos of an attempt on the part of the counsel in the O'Donnell case to state to the jury the prisoner's version of the killing, although it was not proposed to prove the facts of the statement in evidence. The judges of England held that counsel had no right to make such statement:

"In the sixteenth and far into the seventeenth centuries prisoners were not only undefended by counsel, but were debarred from the privileges of calling witnesses on their behalf. A trial for felony three centuries ago was little better than an altercation between the prisoner at the bar and the witnesses examined against him, the averments of the latter being met by the denials of the former; and as soon as the list of witnesses was exhausted the presiding judge, in a few brief sentences, called on the jury to deliver their verdict. Afterward the practice arose of allowing the prisoner to call witnesses, but they were not examined on oath in order to avoid the risk of perjury being committed, which must have been the case on the one side or other if the evidence was conflicting. During this period the prisoner could tell his story and his unsworn witnesses could support his case, but the only strict legal evidence was that submitted by the sworn witnesses for the crown. At length the time came when terror of perjury ceased to operate, or the judge got used to it, though it was all on the one side, and a prisoner's witnesses were allowed to be sworn.

"Before this immense stride was taken the practice arose—such was the overflowing mercy of our laws—of allowing prisoners the assistance of counsel, but only to the extent of arguing questions of law, of which, notwithstanding the well-known maxim, they might possibly be ignorant. At last the edifice was crowned, and counsel were allowed to defend prisoners on all points both of law and of fact, and to exercise all their forensic ability to secure their acquittal. Now it appears to us that the only question is whether, at this last stage, it was intended to extend or to curtail a prisoner's privileges. This, however, can admit of but one answer."

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Carstairs, &c. v. Mechanics, &c., Ins., Co., in the U. S. Cir. Ct., Md., presents a point of interest to both insurance and

railroad companies. Plaintiff had insured certain goods which he shipped from Peoria to Philadelphia. The policy contained a stipulation that in case of loss the insurance company should be subrogated to plaintiff's right to recover from the railroad. But the bill of lading issued by the railroad contained a stipulation that in case of loss, by which it should become liable to plaintiff, it should have the benefit of any insurance effected on the goods. The goods were destroyed in a collision while in transit and plaintiff brought this action on the policy against the company. The company objected that plaintiff had assigned, by the stipulation in the bill of lading, the benefits of the policy to the railroad. The plaintiff answered that the stipulation was void as it protected the road against its own negligence. The court held that though a common carrier can not escape liability for his own negligence at the expense of the shipper, yet it may insure itself against such negligence, and may contract for the benefit of insurance taken out by the shipper.

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## THE LAST VOLUME (No. 107) OF THE UNITED STATES SUPREME COURT REPORTS.

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This volume contains a number of patent, revenue and admiralty cases, the former two of which are interesting to only a small branch of the profession, and the latter, although belonging to an older and more highly-developed part of the law, are of little use in this section of this country. But after these are passed over there still remains a large residuum of very able and well-written opinions upon interesting questions which, aside from the dignity of the court rendering them, merit reading as literary productions. The United States Courts and the State Supreme Court, both sitting in the same State and having jurisdiction over the same extent of territory, and yet each being independent one of the other, must give rise to very interesting questions as to how far one is subordinate to the other, or rather how far the United States Courts are bound by the decisions of the State courts. Such a question is presented in Burgess v. Seligman, page 20, which was

a suit brought in the United States Circuit Court of Missouri to construe a statute of that State. At the time the action was brought there was no decision of the State Court construing it, nor was there any when the decision of the circuit court was announced, but afterwards, and while an appeal from the circuit court was pending in the United States Supreme Court, the Supreme Court of Missouri (in a case between the very same parties) construed the statute in a manner directly opposite to the circuit court, and it was claimed the United States Supreme Court should, for this reason, put itself in accord with the State court and reverse the decision of the circuit court. But Judge Bradley held that while the Federal courts follow ordinarily the State court in construing local statutes and land law, yet they are not to wait for the State court to decide the question and then merely register their decision, and, therefore, the judgment of the circuit court is not to be reversed merely because the State court subsequently adopted a different view. The authorities are cited in full. In a subsequent case, Myrick v. Michigan Central R. R. Co., page 102, it is held that the decisions of a State court construing the contract of carriage by a railroad company does not govern the Federal courts in that State. Such questions are of general, not local, law, upon which the court must exercise its own discretion.

The well-known case of Bush (the Fayette county negro who was convicted of murder and sentenced to death, but on appeal had the judgment reversed by the Court of Appeals, was again convicted, again appealed, but the judgment being affirmed he appealed to United States Supreme Court, which reversed the Court of Appeals of Kentucky) is reported on page 110. The main proposition in the opinion, which is by Judge Harlan, is that it is to be presumed that the State authorities enforce the amendments to the National Constitution, and recognize them as binding on the citizens and every department of government, and to the disregard of any conflicting provisions in the State Constitution or laws. But this presumption is not to be indulged where the State, since the adoption of the amendments, has passed any statute inimical to these amendments. So the General Statutes of Kentucky, having been adopted in 1873, and allowing only free white citizens to serve on juries, are, in

this respect, unconstitutional as denying the right of jury service to certain citizens on account of their color. And so the indictment was set aside. It is to be observed that the court does not assert that every negro is to be tried by a jury of his color, but that the jury law excluding colored men from the jury on account of their color is unconstitutional, and, therefore, any indictment framed by a jury constructed under that law is void. This law was pronounced unconstitutional, in Commonwealth v. Johnson, 78 Ky., 509, decided in June, 1880, but Bush had been indicted in the preceding month. The word "white" was also afterwards stricken from the statute by the legislature by act 26 January, 1882.

In Montclair v. Ramsdell, page 147, the court construes the constitutional provision (found in the Constitution of perhaps every State) that every law shall relate to one object, and that shall be expressed in its title. The act in question was one of the New Jersey Legislature and was entitled "An act to amend an act to incorporate the town of Union in the county of, etc." The body of the act declared valid an ordinance passed by the town of Union without the formalities required by the charter, but under which a sewer was constructed. The court says that the validity of acts with general title has been so long recognized that it can not be questioned that under the title of an act to incorporate the town of Union, a government for the town with the power of taxation, for trying offenders and for laying out streets, could be established, otherwise no municipal government could be created except by a large number of acts. But the title of such acts does not indicate more clearly the contents of the act than does the title of the one in question. It is, therefore, held constitutional. The purpose of these constitutional provisions is said to be to secure a separate consideration for every subject presented for legislative action, and to insure a conspicuous declaration of such subject. But it is not intended that the title to an act should embody a detailed statement of its contents or be an abstract or index thereof. Where the Constitution does not indicate the degree of particularity required in the title, the courts should not embarrass legislation by inquiring into the niceties of expression.

or mere refinements in phraseology. The conflict between the act and the Constitution should be palpable before the former is held void.

Kring v. Missouri, page 221, resembles Bush's case, supra, in that appellant, although three times convicted, on appeals had the sentence twice set aside and new trials ordered, and when the Court of Appeals of Missouri, at last, on the third appeal, affirmed the lower court, he carried the case to the Supreme Court at Washington, and there secured a reversal of the State Supreme Court. The case involved the construction of the constitutional provision against ex post facto laws. At the trial in the lower court Kring had pleaded guilty of murder in the second degree; was convicted and sentenced to twenty-five years in the penitentiary. He appealed, and the case was reversed for an error in the proceedings. On the next trial he was convicted of murder in the first degree, and was sentenced to death. He again appealed, and insisted that, after being once convicted of murder in the second degree, he could not be tried and convicted of murder in the first degree, a higher crime. The State Supreme Court admitted that such had been the law of Missouri, but that before the trial, though after the commission of the crime, the law had been changed. Kring claiming that such a change was as to him an ex post facto law, and contrary to the United States Constitution, appealed to the United States Supreme Court. The court, by Miller, J., holds that an ex post facto law either makes that a crime which was before the passage of the law innocent; or it inflicts a greater punishment than was attached to the crime when first committed; or it alters the rules of evidence and convicts on different or less testimony than the law required at the time of the commission of the offense. The law here complained of changed the evidence, and made conviction of murder in the second degree no longer (as theretofore) conclusive evidence of innocence of the greater crime of murder in the first degree. The law is, therefore, ex post facto, and unconstitutional. There is a very curious case cited: Harting v. People, 22 N. Y., 95, where, after the prisoner had been convicted of murder and sentenced to death, the legislature changed the law by allowing the governor to postpone execution of the sentence indefinitely and confine in the penitentiary until the prisoner should be pardoned, commuted or finally

executed. This was held ex post facto, and that, too, while it (having repealed all other punishment for murder) resulted in letting the convicted murderess go free of punishment. A similar case is cited in Commonwealth v. McDonough, 13 Allen (Mass.), 581. From the opinion in Kring v. Missouri there are four dissents, including the chief justice, but not Justice Harlan.

In the September-October number of the American Law Review there is a very interesting and readable article by Mr. John Norton Pomeroy, criticising Antoni v. Greenhow, page 769 (known as the Virginia Repudiation Case) in which he complains that the court, although composed of Republicans, laid down a doctrine of State sovereignty and independence, more radical than was ever contended for by Mr. Calhoun or Mr. Hayne. He finds that in former years the court, under the leadership of Marshall, Taney and Chase, had adopted a policy of liberally construing the powers of the general government within the scope of its delegated functions, and of enforcing the express and implied limitations upon the States. Thus in the contest between the State of Ohio and the banks incorporated under a law of the State, which provided that no tax beyond a certain amount should be laid on the banks, and the provisions being repealed and a heavier tax laid on them, it was decided that the law was unconstitutional because it impaired the obligation of a contract, and the provision of the United States Constitution on that subject applied to a contract between a State and an individual as well as to contracts between individuals. But it is claimed that a new departure has lately been taken by the court, beginning with the case of Munn v. Illinois (which will be remembered as the Elevator Case), where the court gave a very narrow construction to the provision that no man's property should be taken without due process of law. This was held to forbid the taking of the body of the elevator only, and not any interfering with or curtailing of the profits of the elevator by the State. And this same narrowness controls the court in the Repudiation Case. The chief justice bases his opinion upon the ground that the act complained of as unconstitutional alters the remedy only, and does not curtail the right under the contract; and that a

change in the remedy merely is not prohibited by the Constitution.

It is difficult to draw the line between the right and the remedy with exactness, so that it shall separate the cases, where a right is infringed and a remedy altered merely, just as there must be a contest over that uncertain portion of the day called twilight—to determine whether it is day or night. But it does seem that the chief justice has taken a very large view of what constitutes the remedy, and a very narrow one of what constitutes the right to reach his conclusion. Let us briefly state the case: When the Virginia bonds were sold it was stated on their face that the interest coupons were receivable in payment of all taxes and dues by the State. The subsequent act recited that, whereas, some of the bonds were spurious, therefore, the State treasurer should not receive any in payment of taxes until its genuineness had been established by trial before a jury, and the writ of mandamus which had before been used to compel the treasurer to receive the coupons was taken away, at least until the trial had proved the genuineness of the coupon. The cases say that the test of whether particular legislation has impaired the contract is to determine whether the value of the contract has been lessened. Now it is plain as a fact can be that the coupons being worth only $3 each, and accruing every six months, a law which required the owner to submit to a semi-annual trial before he could use this coupon does lessen its value, if indeed it does not entirely destroy it. This seems self-evident. The position of Judge Matthews in the case is still more ultra, conceding that the act does impair the obligation of the contract, he says there is no means of enforcing the provision of the Constitution, and because the violating party is a State. In this connection there seems much good sense in the opinion of the court in Murray v. Charleston, 96 U. S., 448, where it is said that although a State is a sovereign and, therefore, not liable to suit, yet when she enters the markets of the world and becomes a borrower, she is to be dealt with upon the same principles which apply to contracts between individuals. If this principle had been followed in the Virginia case it appears that a different conclusion must have been reached by the court.

# JEFFERSON COUNTY BUILDING AND LOAN ASSOCIATION v. HEIL, &c.

(Filed December 20, 1883.)

1. Deed—Acknowledgment—A and wife having acknowledged a deed the clerk endorsed a memorandum of that fact upon the deed, but failed to sign it. The deed was recorded in this shape, the recorder supposing the unsigned memorandum would be afterwards perfected. Held—The acknowledgment of the married woman was not properly certified so as to pass her title.

2. Recording—Acceptance—Acceptance of a deed by the grantee is essential to make it valid. The mere fact that the grantor had the deed recorded raises no presumption of acceptance on the part of the grantee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

The mortgage for $3,400 was signed by Heil and wife. Their acknowledgment was taken by a deputy clerk, who entered upon the mortgage the following memorandum: "1875, October 26, acknowledged by Heil and wife, & or. & recorded in deed book 194, page 346," which was not signed by him or subsequently written out in full by the clerk. A recorder employed in the office to record deeds, who was not a deputy clerk, supposing the unsigned memorandum would be perfected, after recording the mortgage, recorded a certificate in due form as if it really existed and had been upon the mortgage. The defect consists of a failure of the deputy to sign the memorandum and of the clerk to allude to the manner in which the acknowledgment appeared to have been taken. Section 38 of chapter 24, General Statutes, requires the clerk to write out and sign a certificate setting forth the facts, including the endorsement made by a deputy, where the latter fails to write out and sign the certificate himself. And when the clerk shall have done this, that section makes it lawful to record the deed and certificate as if the deputy had certified and signed it. This statute was not complied with in any respect. From it and sections 21 and 23 of the same chapter it is fairly deducible that the legislature intended to require that the memorandum should be signed by the deputy and appear upon or attached to the instrument, and so with a complete certificate, whether written out by the deputy or the clerk. When, therefore, there is neither a signed memorandum nor a completed certificate, on or attached to the deed or instrument or

in existence, there is no certificate of acknowledgment in the sense of the statute that will render the deed or mortgage of a married woman effectual to pass her title. (McCormack v. Woods, &c., 14 Bush, 78; Franklin v. Becker and Wife, 11 Bush, 595; Wilson, &c. v. Hughes, Littell's Sel. Cas., 292.) We are of the opinion that the certificate entered on the deed book has no validity because there was no original from which it was copied.

In cases like the present there is no danger to arise from disregarding the recorded certificate, for the original mortgage, after it was recorded, was withdrawn from the clerk's office by the mortgagee, its proper custodian, and made the basis of the suit for its foreclosure. In addition to this it is conclusively shown that the original, with the unsigned memorandum, are precisely in the condition they were made and as they were when improperly put to record. It is truly said in the case of Elliot, &c. v. Piersol, &c., 1 Peters, 328, that "it is the fact of recording and not of acknowledgment that makes the deed effectual," but here we have a different state of facts and may go further and, with equal correctness, say that the fact of recording a legally certified acknowledgment is the essential prerequisite to the conveyance of the title of a married woman, and this we believe to be universal and the conclusive facts which render her deeds effectual in the absence of averment and proof of fraud or mistake in certifying the acknowledgment. The record should be a correct manifestation of the original instruments required to be recorded, and for this reason, which is clearly shown by the original itself, the recording by the clerk's employe of an anticipated but nonexistent certificate, in violation of the clerk's duty and contrary to the object of the registry laws, imparted no validity to the unofficial memorandum entered upon the mortgage and furnishes of itself, not being a copy of such a certificate, no evidence of an acknowledgment by Mrs. Heil.

Appellant's counsel insist that there was a conveyance of the property embraced by the mortgage pendente lite by Heil and wife to his father-in-law, Bischoff. Delivery and acceptance of the deed were denied by the parties to it, and there is no evidence that Bischoff accepted the deed or did any act

equivalent to or tending to prove actual acceptance, nor do the circumstances afford a reasonable presumption of the fact. The mere fact that Heil and wife executed and caused the deed to be recorded does not raise any presumption of law, in the absence of facts showing that the deed was beneficial to the grantee and that it was to his interest to accept it, that he had accepted the deed.

Such a presumption is never conclusive, and partakes of the nature of a presumption of fact rather than law, and when relied upon by a third party, whose conduct has been unaffected by the existence of the deed, or disputed by those whose rights have attached to the property embraced by the deed before its actual acceptance, that question is open for inquiry, and the execution and registration of the deed then are mere facts, competent with other evidence, to prove the fact of actual acceptance. Consequently there is not enough evidence, there being nothing but execution and registration of the deed, to prove its acceptance by Bischoff, which he emphatically denies.

Mrs. Heil was not a party to the original suit for foreclosure, and according to Wing v. Hayden, 10 Bush, 276, she was not precluded by the judgment of foreclosure from asserting, with her husband, the right to $1,000 of the proceeds of the sale in lieu of homestead, the property being indivisible, and had necessarily been sold as a whole to satisfy the mortgage, which was legally acknowledged and recorded. The case of Harpending's Ex'or v. Wylie, &c., 13 Bush, 158, is not applicable to this case. Sixty days from the chancellor's decree of foreclosure and sale had not expired when the petition of Heil and wife was presented, hence for that reason, and others not necessary to enumerate, the matter they have asked to be adjudicated was not res adjudicata, and there was no error in allowing the petition to be filed.

Wherefore, the judgment is affirmed.

John & J. W. Rodman and M. A. & D. A. Sachs for appellant.

Kohn & Barker for appellees.

## LOUISVILLE & NASHVILLE R. R. CO. v. TURNER.

(Filed December 18, 1888.)

**Bill of exceptions—Where time is given until a certain day for filing a bill of exceptions it must be filed on or before that day; and where it was not filed until afterwards, the court, on appeal, will not consider it, by reason of an alleged agreement of counsel (which does not appear of record) that the time should be extended.**

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellant was given time until the third day of the term succeeding that in which the verdict and judgment were rendered to prepare, present and file a bill of exceptions.

No notice was taken of the subject or order made or asked for extending the time to present and file the bill of exceptions until after the expiration of the third day of the term mentioned.

On the fourth day of the term an order was made extending the time until the eighth day of the term to prepare and file the bill, and after another extension it was offered and filed. The appellee has moved to strike the bill of exceptions from the record on the ground that it is not legally a part of the record, and the counsel for appellant filed an affidavit stating that appellee's leading counsel consented to the extension and agreed to have the orders made for that purpose, but the latter specifically denies the agreement, leaving this controverted fact in equipoise, and illustrating the danger to the security, to the rights of the successful party which would follow a consideration by this court of anything but what is shown by the record on such a question.

The consideration by us of ulterior facts shown by conflicting affidavits would be usurping original jurisdiction which belongs to the circuit court upon proper presentation of the question to be determined by them. If there was any fraud practiced in this case which misled appellant's counsel and prevented them from asking the extension on or before the third day of the term it must be tried by another tribunal before we can look into it as an appellate court.

The condition of the record must be proved by itself in cases like this, and its verity will not be allowed to be questioned

and tried in this court. There is a plain and explicit remedy belonging to another jurisdiction, to correct erroneous or false records, and the practice in this court in such cases is well marked by authority, and can not be varied in this instance.

Uncertainty and confusion would result from the trial in this court of questions whether any order or proceeding in the lower court was made or took place at a different time or manner than is exhibited by the record, or whether any right has been waived by one party or conceded to another by the occurrence of any fact which could form the basis of an original inquiry de hors the record before us. We are, therefore, constrained, in accordance with the cases of Freeman v. Brenham, &c., 17 B. Monroe, 603; Meadows v. Campbell, 1 Bush, 104; Smith, &c. v. Blakeman, 8 Bush, 476, and subsequent cases in this court, to hold that the bill of exceptions purporting to be a part of the record is not a part of it, and the motion to strike it from the record must prevail. As none of the evidence or instructions, in the absence of the bill of exceptions containing them, are before the court, and the pleadings are sufficient to uphold the verdict and judgment, the latter must be affirmed.

Porter & Porter and Wm. Lindsay for appellant.

E. W. Hines and Rodes & Settle for appellee.

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## RICHEY v. COMMONWEALTH.

(Filed December 20, 1883.)

**1. Indictment—Dates—Where the appellant was indicted for falsely swearing before the grand jury that he had no pistol at the time of a difficulty between him and another, the indictment was not defective because it failed to give the correct date of the difficulty.**

**2. False swearing—In indictment for false swearing it is necessary to allege only that the testimony was given on a subject about which the accused could be legally sworn; and that the oath was administered by one authorized to administer oaths.**

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hines.

On a charge of false swearing there was a conviction and sentence in this case of confinement in the penitentiary for one year.

The principal complaint on the appeal is that the indictment is defective.

It is charged in the indictment that at the March term of the Barren Circuit Court, 1883, in the investigation as to a difficulty between appellant and one Chenault, which is alleged to have taken place in December, 1883, appellant having been sworn by the foreman of the grand jury, duly organized and having jurisdiction to make the investigation, he willfully, falsely and corruptly swore that he had no pistol at the time of the difficulty. The main objection relied upon is that the date of the difficulty is alleged to have been subsequent to the alleged offense of false swearing and subsequent to the finding of the indictment. It is insisted that this indictment would not be a bar to a subsequent indictment and prosecution. The indictment properly alleges the date of the false swearing, which is the offense for which he was tried, and that date under the Code was necessary to be alleged. The allegation as to the difficulty was material only so far as to identify it as the difficulty in reference to which appellant swore when being examined, and the allegation of an impossible date does not invalidate the indictment since the place of the difficulty and the name of the person with whom it was had is fully set forth in the indictment.

In an indictment for false swearing it is not necessary, as in an indictment for perjury, to allege that the evidence given is material to the issue being tried. It is only necessary to allege facts showing that the testimony was given on a subject in reference to which he could legally be sworn, and that the oath was administered by one authorized by law to administer the oath.

We see no objections to the instructions. We can not consider the weight of the evidence. It is sufficient that there is some evidence tending to establish guilt.

Judgment affirmed.

Carr & Bullock for appellant.

P. W. Hardin for appellee.

# SLAGEL v. COMMONWEALTH.

(Filed December 15, 1883.)

1. Self-defense—In a case where there was no evidence that the accused did the killing in sudden heat and passion, or acted in his own self-defense, an instruction upon the law of self-defense is improper, and should not be given.

2. Indictment—Distinct offenses—Demurrer—Where appellant was charged in one and the same indictment with the murder of three different men, but the prosecution dismissed the indictment as to two of the men, Held—No demurrer to the indictment could be sustained on account of the misjoinder.

3. Grand jury—Exemption—The fact that the owner of a grist mill was a member of the grand jury that found an indictment is no ground for quashing the indictment, as under General Statutes, chapter 62, article 1, section 1, such a person is not disqualified, but exempted merely from grand jury service.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Hargis.

On the evening of the 13th of August last, the appellant, in company with John O'Adair, James O'Adair and Joseph Claiborn, went to a grocery and bought a quart of whisky, paid $1 for it, and received $9 in change for a $10 bill. He also got a $20 bill changed and shortly afterwards was seen counting out money on the knee of one of the O'Adairs. All of them left the grocery together and returned to a rock house situated at the top of a cliff, where they were camping while being engaged in cutting railroad ties from the surrounding woods. They were seen together at the rock house that night, the appellant apparently sober and the others intoxicated. He said a few days before that he had no money. The O'Adairs were known to have brought $35 to the camp with them.

Next morning the appellant had disappeared and the O'Adairs were found at the bottom of the cliff, one dead and the other in a dying condition, and Claiborn was lying dead at the top of the cliff, and on the outside of the rock house. Each of them had been knocked in the head and his skull mashed with an ax, which was found lying in the rock house, bloody. The other three axes, which had been used by the party in cutting timber, were also lying in the rock house, but with no stains of blood upon them. Three pallets, side by side, with the feet to the fire, had a pool of blood at the head

of each; and a fourth pallet, transversely laid at the head of the three, was unstained by blocd, and had at its head appellant's old hat, and at its foot his old shoes.

Near the middle of the night before this discovery the appellant came to a railroad station, some three miles from the rock house, and asked if he could flag a train that night. He was told that he could. He was heard talking with an unknown person on the outside of the house at the station. Nothing more was heard of him that night. Next day about noon he was seen at a point ten miles from the station. He bought a pistol and cartridges on his road to Monticello, where he arrived that evening, thirty-five miles from the scene of the slaughter, in possession of Claiborn's gun, and with his coat, vest and hat on his person and James O'Adair's watch in his pocket, which he sold for $5. Next morning, in conversation with a friend, he said he "expected to be accused of killing Jim 'OAdair and others on the K. C. Railroad." He was suspicioned on account of his actions, and was watched. During the day, upon a telegram, he was arrested and $19.50 found in his possession. He admitted they were Claiborn's clothes he had on, but said he had bought them, and when taken to the neighborhood of the tragedy he said that he did not do "the knocking," but knew who did do it; and that he went to bed with O'Adairs and Claiborn the night of their death.

There was some evidence tending to prove that he also had on Claiborn's boots when arrested. On this strong array of circumstantial evidence he was indicted, tried and convicted of the murder of Claiborn, and sentenced to death in pursuance of the verdict, and now appeals to this court seeking a reversal of that awful doom.

The jury found him guilty and the evidence is sufficient to support the verdict, therefore, there is nothing for our consideration except the alleged errors of law occurring at the trial, which will be noticed in the order made:

1st. It is contended that the court ought to have quashed the indictment because a keeper or owner of a grist mill was on the grand jury that found it. This objection, according to Pritchett v. Commonwealth, 11 Bush, 277, is untenable.

2d. That the demurrer to the indictment ought to have been sustained because of a misjoinder of offenses, the appellant being indicted for the murder of all of the dead men in the same indictment. This would have been true but for the dismission by the attorney for the Commonwealth of two of the offenses, which obviated the necessity for sustaining the demurrer. (Criminal Code, section 168.)

3d. It is insisted by appellant's counsel that the court should have instructed the jury in the law of self-defense and sudden heat and passion because no eye saw the perpetration of the offense. The rule is where there is any evidence tending to support any view of the case embraced by the position of the prosecution or the plea of the accused that it is the court's duty to instruct the jury with reference thereto; but where there is no evidence in the case, or the evidence is of such a character as to leave no room for doubt of any shade that a given phase of the law is not applicable to the case, it ought not to be embodied in an instruction to the jury. A treatise, abstract, or analysis of the whole law of homicide should not be given in every case, but only so much of the law as applies to the facts of the case under investigation. The court should, however, be careful to explain the law applicable to all grades and tendencies of the evidence, which must be weighed by the jury, who, and not the court, are authorized to pass upon its sufficiency. Had there been any previous misunderstanding or quarrel, or were there any circumstances connected with the case tending to show that self-defense or sudden heat and passion might have attended the homicide, the court should have explained to the jury the law relative thereto. But there is not a circumstance tending to show that either self-defense or sudden heat and passion was the cause or reason for the triple homicide.

The facts of this case demonstrate that the victims were murdered for their little money and property while in deep and intoxicated slumber; and their bodies, except one whose immediate death made it unnecessary, were thrown over the cliff to make sure the destruction of life.

It was cold-blooded and pitiless assassination for small gain, large enough though to induce its commission by the appel-

lant, who had no money, was uneducated and had been badly raised. His unpropitious surroundings from birth, his lack of training and education, his age, now but twenty years, and his character for being a good work hand are the only and best extenuations found for him in the record.

These will not avail him in law as a defense. His crime is either murder or nothing. That issue was correctly placed before the jury by the court, which properly decided that no instructions were appropriate, as the law of the case, save those prescribing the essentials constituting murder and the law of reasonable doubt, and there being no legal reason for disturbing the verdict the judgment thereon is, therefore, affirmed.

Denton, Waddle & Parker for appellant.

P. W. Hardin for appellee.

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## MEAUX v. MEAUX, &c.

(Filed December 15, 1883.)

1. Bill of exceptions—When time has been given until a certain day to file a bill of exceptions, it may be filed on that day, or on any day preceding it. Tendering it within the required time is equivalent to filing it.

2. It is dangerous practice to extend the time for filing into a succeeding term when court and counsel are liable in the meantime to forget the most important of the testimony and of the exceptions.

3. Transcripts—Originals—Spœ. duc. tec.—Where the clerk in making out the transcript copies the instructions into the bill of exceptions the appellate court will not issue a subpœna duces tecum to bring up the original instructions or bill of exceptions unless there is an affidavit that the instructions copied by the clerk are not those really given or refused by the court. The same rule will be applied to any exhibit made part of the bill.

4. Grounds for new trial—Assignment of error—First, that the court erred in admitting incompetent or in rejecting competent testimony is sufficiently definite as a ground for new trial only, and not as an assignment of error, for the appellate court knows nothing of the evidence, and has not (like the trial court) been made familiar with it in the progress of the trial, and by the exceptions taken by counsel. The particular testimony complained of should be set out in the assignment. Second, that the court erred in granting or refusing the instructions asked by plaintiff or defendant is sufficiently definite, both as a ground for a new trial and as an assignment of error. The appellate court can readily find the instructions all grouped together in the bill of exceptions. So, also, "that the verdict is contrary to the evidence," is sufficient, both as a ground and an assignment. Third, but "error of law occurring at the trial" is sufficient neither as a ground nor

**as an assignment. It brings up for review the entire record, and every step taken during the progress of the trial. It is too general.**

**5. Cross-examination—Collateral matter—A witness may be compelled to disclose his interest, motives and prejudices on cross-examination, but he can not be questioned as to matters entirely collateral to the issue, merely for the purpose of contradicting him.**

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

This record presents various questions of practice under the Code that the court should dispose of before proceeding to consider the merits of the controversy. This is an appeal from the judgment below determining that a certain paper offered for probate in the Mercer County Court is not the last will and testament of Sawney Meaux.

The first question presented is, does the bill of exceptions form part of the record? Section 334 of the Civil Code provides that "the party objecting must except when the decision is made, and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the court." The bill of exceptions in this case was tendered in open court at the succeeding term, and before the day fixed for filing it, and taken for consideration by the judge and filed at the same term, but on a day susbequent to the day fixed in the order for filing it. It is insisted by counsel that the appellant had no right to file or tender the bill on any other day than the one designated at the time leave was given to file it at the succeeding term, and if this is not the correct practice that it was not filed until a subsequent day, and, therefore, should be excluded from the record. The provision of the Code evidently intended that the party whose duty it was to prepare and present the bill should not file it at a day beyond that fixed by the court when extending the time; and the words "not beyond a day to be fixed by the court," would imply a right to file it at any time during the term before the day. It is argued that if this is the construction given the provision that the appellee or the adverse party is required to be in court every day of the term, up to and including the day fixed, in order that he may have an opportunity to examine the exceptions, or at least to know that they are filed. This would

work a seeming hardship, but it is to be presumed that the application for an extension of time must be shown to be absolutely indispensable before the judge will grant it, and, therefore, that such cases will seldom occur. It is an unsafe and dangerous practice, causing often much injustice to litigants, to extend the time to a succeeding term when court and counsel may lose sight of the material and important exceptions taken, as well as forget the statements of witnesses, whose testimony is of the greatest importance to the one side or the other, and as it is only in cases of necessity, arising from a want of time to prepare the bill, where time will be given, cases resulting in the inconveniences complained of must seldom occur. We think, therefore, that the appellant had the right to file the bill before the day fixed by the court; and that a tender of it should be regarded as equivalent to a filing. The bill was prepared and in a complete state, and when tendered to the judge, and taken by him for consideration, the appellant had no control over it. He had done all he could have done, or was required to do. He tendered it for the purpose of filing, and it should be considered as filed.

It is again insisted that the instructions are not part of the record, and the original bill of exceptions is brought to this court for the purpose of showing that the instructions were not embodied in the bill when signed by the judge, and the words "here insert them" not entered so as to direct the clerk what instructions to copy. In the opinion delivered at the last term in the case of Forest v. Crenshaw, 4 Ky. Law Rep., 496, the instructions were made part of the record by an order of court, or included in the bill of exceptions, but the clerk in a subsequent part of the record certifies that these were the instructions given. The bill of exceptions signed by the judge was not complete, and what instructions were given or refused this court could not know, except from the statement of the clerk. The usual mode of making up bills of exceptions is by the direction here insert instructions 1, 2, etc., or instructions A B, etc., or instructions in the handwriting of the court or counsel, so as the clerk can identify them, and when copied into the bill of exceptions in the usual form the bill is complete and the instructions a part of the record, or where the court directs the insertion of the instructions, without iden-

tifying them, and the clerk inserts the instructions, thereby making the bill complete. This court will not grant the writ of subpœna duces tecum, that the original bill may be inspected, unless there is an affidavit that the instructions embodied in the bill were not those offered, given or refused by the court on the trial; and so with reference to any exhibit made part of the bill of exceptions.

Again, it is urged that the grounds for a new trial are not sufficiently specific. The grounds are:

1st. Because the court permitted the introduction of incompetent and illegal testimony that was excepted to at the time.

2d. Because the court erred in refuting important testimony which was offered in his behalf.

3d. Because the court erred in giving the instructions for the defendant.

4th. The court erred in refusing instructions offered by the plaintiff.

5th. Because the verdict is contrary to the law and evidence.

6th. Because of errors of law occurring at the trial and excepted to by defendant.

All of these grounds are sufficiently specific for the trial court except the 6th: "Because of errors of law occurring at the trial." Such a ground brings up for revision before the trial court and this court the entire record, and requires an examination of every step taken for the purpose of ascertaining whether any error exists to the prejudice of the party complaining. It is too general, and will be disregarded. An error in refusing competent testimony, or in admitting incompetent testimony, was under the former practice sufficiently stated, although general in its terms, in a motion for a new trial. The court during the progress of the trial must be presumed to know the exceptions reserved by counsel in this regard (for without the exceptions the error will not avail), and when the motion is made it is informed of the errors by reason of the exceptions, and in regard to instructions an error in giving instructions for one party, refusing to give for the other, is sufficient, because exceptions are taken at the time they are given or refused.

The trial court is informed of the errors by the exception taken during the progress of the trial, and its attention is again called to them by the motion and grounds for a new trial.

When the case reaches this court the grounds stated in the court below on the motion for a new trial, viz., that the court erred in refusing important testimony offered by the plaintiff, or erred in admitting incompetent testimony for the defendant, may be made the basis of a more specific statement in this court in assigning the errors. The particular testimony complained of should be stated. This should be done for the reason that this court is not as familiar with the record as the court below. The trial judge is presumed to know, from the general grounds stated, what errors are being complained of, as exceptions were reserved during the progress of the trial. If the grounds in the motion for a new trial are to be as specific as the assignment of errors, and this court having adjudged that nothing can be assigned for error that was not made a ground for a new trial, there would be no necessity for an assignment of errors in this court as the grounds are fully stated in the court below. The object in making the assignment here is that they shall be more specific, and particularly in regard to the admission or rejection of incompetent testimony. The same particularity is not required in regard to instructions in this court when the errors come to be assigned. The instructions given and refused are found together in the bill of exceptions, when made out in the usual form, and a mere glance by the judge having the record will enable him to ascertain the instructions to which the assignment of errors applies. Errors in this court in regard to evidence are like errors in reference to a commissioner's report of settlement in a suit in equity, unless the assignment points out the particular error, the court must read the entire evidence, or the entire settlement, in order to ascertain of what the appellant is complaining. An assignment, therefore, in this court that the court erred in giving the instructions for the plaintiff, or in refusing instructions for the defendant, will be held sufficient. The instructions can be readily ascertained without even the brief of counsel, and by a cursory examination of that portion of the bill of exceptions containing them, but not so in regard to the

evidence. The absence of any brief, or the omission in the brief to refer to the evidence complained of, would necessitate the reading of the entire record outside of the pleadings. This court in the case of the L. & N. R. R. Co. v. McCoy, ante 397, delivered at the present term, alluding to assignments of error in reference to instructions, held that a general assignment was sufficient where they applied to the same subject, and laid down the liberal rule in addition that where the assignment called the attention of the court to the error complained of it was sufficient. That the verdict or judgment is contrary to the evidence is also sufficient, and brings up for review, where there is no other assignment, the entire testimony for the purpose of determining whether the verdict is palpably against the testimony. In this view of these questions of practice the grounds contained in the motion for a new trial below are sufficiently specific, and so of the assignment of errors in this court. The Code of Practice was adopted for the purpose of simplifying the pleadings and practice, and to prevent mere technical questions from obstructing the administration of justice and defeating the substantial rights of the parties. Good pleading is always essential. A cause of action must be stated, and the answer when made must present a defense to the recovery, or some reason why the judgment should not be rendered at the particular time. Counsel, when a case is decided against his client upon an issue of law or fact, has the right to an appeal where this court has the jurisdiction, with reference to the same issues, and while a rule of practice is indispensable in all judicial tribunals, its provisions should be liberally construed, and in such a manner, when not in conflict with the rule, as will enable the parties to be heard on the merits of the controversy. Technical rules never aid the real lawyer or the court, and certainly tend to defeat the substantial rights of litigants.

On the merits of the case the principal question arises upon the admissibility of the testimony for the contestants delivered upon the cross-examination of an attesting witness to the will, W. Johnson. The issue was, first, as to the mental condition of the testator at the time he executed the paper; second, under influence received in procuring its execution by the appellant, etc. The witness at the time the alleged will was

executed, or on the same day, was, under a power of attorney executed by the testator, authorized to transact his business. After the propounders of the will had examined this witness in chief the contestants in cross-examination required him to make many statements in regard to the business transactions between himself and the testator, and when denying that he made certain statements with reference to these matters, he is contradicted by other witnesses with a view of breaking down his testimony. Collateral issues are thus formed calculated to mislead the jury and to prejudice them against the witness or his testimony by the repeated contradictions of his statements by other witnesses in regard to matters having no bearing on the issue. In fact as to all such questions he becomes the witness for the contestants, and they ought not to be allowed to contradict him. The contestants were allowed to show that Johnson said to a witness "that the principal devisee was a bitch, and that Sawney was no better;" that Charlotte, the devisee, had slandered him; was allowed to prove by this witness that Johnson told him that he would stand to him if he would be his witness in a suit; and all this was in contradiction of what Johnson had stated. There is no rule better settled than "that when a witness is cross-examined on a matter collateral to the issue he can not, as to his answer, be subsequently contradicted by the party putting the question." A witness may be compelled to disclose his interest in the controversy, his motives and prejudices, with a view of enabling the jury to place a proper estimate on his testimony. The cross-examination, or the matters brought out by it, must be relevant to the issue. In much of this testimony by the contestants the effort is to show that Johnson had made statements out of court that he would not make in court. This is not the mode of contradicting a witness. The contestants were properly allowed to prove that the witness had made statements different from his present testimony, where that testimony was in regard to the issue involved, but proof of the statement by the witness that other witnesses, in some other trial, had sworn to lies or were prejudiced, was incompetent, although it sought, and perhaps did, have reference to the inquest of lunacy that was held with reference to the mental condition of the testator shortly before he died. The witness might have been asked as to statements made by him in regard

to the mental condition of the testator, or his bias might be shown by proof of his conduct with reference to the particular litigation, but as the record is presented here the issue of devisavit vel non has been lost sight of in the attempt to discredit Johnson by proof of matters having no relation to the issue. The more serious objection is further made that when all this testimony was admitted the court declined to tell the jury that it was intended to impeach the witness only, and must be regarded in that light. The court was asked to say that the contradiction of the witness only went to his credit; and that the conversations with Johnson should be all excluded, except so far as it affected the execution of the will and undue influence. This may have been too comprehensive, but with this character of proof one of two instructions, 4 and 5, should have been given, or both.

We perceive no objection to the other instructions, except that the undue influence, if it existed, must have operated upon and controlled the action of the testator at the time the will was executed. Instruction No. 2, at the instance of defendant (contestants) should not have been given. By its terms any frailty of mind renders a party incompetent to make a will. The judgment is reversed and cause remanded, with directions to award a new trial and for proceedings consistent with this opinion.

P. B. Thompson, Sr., M. J. Durham and Poston for appellants.

Bell & Wilson for appellees.

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## CLERK OF LOUISVILLE CHANCERY COURT, ON RELATION, &c. v. TROUT, &c.

(Filed January 19, 1884.)

**Bankrupt assignee—Action by—Limitation—United States Revised Statutes, section 5057 (providing that no action shall be brought by an assignee in bankruptcy against a person claiming an adverse interest in the property of the bankrupt except within two years after the cause of action accrued to the assignee), applies to an action by the assignee to enforce a lien on land sold by the bankrupt. Although the assignee is not claiming the land itself, yet he is claiming an interest in it, and to that extent adversely of the purchaser.**

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

This was an action in the name of the clerk of the Louisville Chancery Court for the benefit of Mosby, assignee, etc., who is the real party in interest, and the substantial plaintiff, to recover the amount of several bonds executed by Trout, as purchaser at a judicial sale of some real estate belonging to the bankrupt, and to enforce an alleged lien upon said realty for the satisfaction thereof. More than six years had elapsed from the time the assignee could have sued until he did sue on the bonds, and in the meantime Trout sold the land to certain persons named in the record and they sold it to the appellee, The Newcomb-Buchannan Co., who paid its full value regardless of the bonds, and as a defense, under these circumstances, pleaded the statute of two years' limitation provided by section 5057, Revised Statutes (U. S.), in bar of the action.

That section declares that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." This section has been frequently construed and held applicable to actions in State courts. (Comegys v. McCord, 11 Ala., 932; Peifer v. Harmer, 5 Bank. Reg., 253.) It is contended, however, that the rights claimed by the appellee are not adverse to those which the assignee is seeking to enforce, and for that reason the statute is not applicable. We do not agree with this proposition because the right to a lien is as much a right of property as is the thing or debt secured by the lien, which is transferable, and in this instance was vested in the assignee. And while it may be that the assignee is not suing to recover the land, he is seeking to have it sold to pay his alleged lien, and thus enforce a right touching the property in which the appellee has an adverse legal and equitable interest.

The appellee's interest and claim thereto are adverse to the lien claimed by the appellant, and in direct conflict with it. We, therefore, agree with the learned vice chancellor in hold-

ing the statute applicable to this case, and that the assignee's suit was not maintainable because more than two years had elapsed from the time when the cause of action accrued to him. It is not necessary to enlarge upon what has been so often and well said in numerous decisions of the good policy and purpose of the short limitation provided by the statute. As the object of the bankrupt law is to release the debtor from unmanageable and overwhelming embarrassment, and allow him an opportunity for another start in life and business, the sooner his estate is collected and dstributed the better for all concerned in it. While the time is apparently short, when compared with our State statutes of limitation, it is certainly long enough within which to institute actions to recover the debtor's property and assets which he is bound and presumed truly to disclose in his application for the benefits of the law in the very beginning.

Judgment affirmed.

Wm. Reinecke for appellant.

Bijur & Davie for appellees.

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## LOUISVILLE WATER CO. v. HAMILTON.

(Filed December 20, 1883.)

**1. Taxation—Water companies are liable to taxation under the provisions of General Statutes.**

**2. Retrospective legislation—A special act exempting a water company from "payment of taxes of all kinds" does not apply to taxes accrued prior to its passage. A statute will not be given a retroactive effect unless such is the plain legislative intent.**

**3. Mode of compelling payment of taxes—Water companies, like railroads or turnpikes, being established for the public benefit, its property can not be seized by the sheriff and sold for taxes. If it refuses to pay it may be compelled by rule or by the appointment of a receiver to operate the property.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This appeal is from a judgment of the Louisville Chancery Court enforcing the collection of taxes by the sheriff, and is to prevent the levy by him of an execution on appellant's property. The Louisville Water Co. is a corporation, the stock of

which, or the greater part of it, is owned by the city of Louisville, and whose business it is to supply the inhabitants of the city with water. Taxes had been assessed against the property of that corporation for several years, and for some reason the company declined to make payment, and when payment was about to be enforced by the collecting officer this action was entered in the court below and an injunction obtained prohibiting a sale of the property of the corporation until the case could be heard by the chancellor. It is claimed in the petition that it is a public corporation, and not liable to taxation by reason of the public benefits resulting to the city of Louisville from the exercise of the corporate privileges. Without entering into a discussion of this branch of the case it is a sufficient response to say the third section of article 1, chapter 92, title "Revenue and Taxation," provides in definite terms what property shall be exempt from taxation, and the exemption does not apply to this character of corporation, but by section 4 of article 12 of the same chapter it is provided: "It shall be the duty of the president, secretary or treasurer of any gas or water company, or association in this State to report under oath to the auditor of public accounts on the 10th of July in each year a complete statement of all property, real, personal and mixed, including buildings, engines, machinery, pipes, reservoirs, tanks, etc., under the control of such gas or water company, and any cash in hand," etc. Upon their valuation they are required to pay tax, and the individual stockholders are not required to list their shares for the reason that the taxation is based on the real value of the property as reported by the chief officer of the corporation, and the corporation is required to pay the tax and not the stockholder.

By the 1st section of chapter 27, General Statutes, page 881, title "County Levy," it is provided that whenever the county court of any county in the Commonwealth shall, by virtue of any power conferred by law, order and direct an ad valorem tax to be assessed, levied and collected in said county, it should be the duty of the assessor of the county to proceed to assess, at his regular assessment, all the property in said county not specifically exempt from taxation by virtue of General Statutes, chapter 92, article 1, section 3, title "Revenue and Taxa-

tion." Section 2 of this same act requires the chief officer of certain companies and corporations, including in express terms water companies, to list their property, or cause the same be done, with the county assessor, where they own property within the county, for the purposes of taxation.

A reference to these several statutes make it manifest that it was never the intention of the legislature to relieve such corporations from their share of the burden of taxation, but on the contrary evinces a clear purpose to tax such corporate property. With this legislative intent declared in express terms, it is needless to determine the nature of the benefits resulting to the city of Louisville from the exercise of the franchise, or to inquire whether or not it is that character of corporation where the benefits bestowed bring it within the general statutory exemption.

Whether this court went too far in the case of the City of Louisville v. Commonwealth, 1 Duv., 295, is not necessary to be decided here, but it is evident that property of the value of two or three millions of dollars, with an income, after paying the ordinary expenses and the interest on its bonded indebtedness, of $80,000, should not escape taxation for State or county purposes unless there is a special exemption based upon a consideration that obviates the constitutional objection to that kind of legislation.

It is maintained in this case that there is a statutory exemption. By an act of April 22, 1882, the legislature amended the charter of the Louisville Water Co. by providing: "The sinking fund of the city of Louisville, being the owner of the stock of the Louisville Water Co., and said water company, by virtue thereof, is the property of the city of Louisville, therefore, the Louisville Water Co. is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal and special." The question presented here is whether the appellant was released from the payment of taxes already imposed by reason of this enactment, that is, for taxes due or unpaid before the act was passed. We think it was only intended to relieve the company from the burdens that might thereafter be unpaid. A statute will not be construed to be retrospective

unless such is the plain legislative intent. In the case of the C. & O. R. R. Co. v. Judge, &c., 10 Bush, 564, it was said: Courts will apply new statutes only to future cases unless there is something in the very nature of the case, or in the language used, which shows they were intended to operate retroactively. In the case of the Lincoln County Court v. Louisville & Nashville R. R. Co., M. S. opinion, this court held that it was not intended to exempt companies from the payment of taxes for preceding years under an act providing that no county or city shall hereafter assess, levy or collect any taxes upon the railroad companies of this State except as provided in the act.

Cooley on Taxation says: "The intention to exempt must in all cases be expressed in clear and unambiguous terms. Taxation is the rule, exemption the exception." A glance at the act in question will determine the legislative intent as ascertained by the court below, and if not, the act must be regarded as of such doubtful meaning as to render such a construction as is insisted upon by appellants too uncertain, where the result will be to relieve the party from a burden assumed in common with others, and which in justice it ought to bear.

The act should not be construed as affecting the taxes imposed prior to its passage. It is insisted by counsel for the appellee that the act is unconstitutional because it gave to appellant immunity from taxation when all other companies, or similar companies, are required to pay their proportion of the tax.

It is not necessary to determine such a question in this case as it is not necessarily involved in the controversy, the court having adjudged that the exemption does not relieve the appellant from the taxes sought to be recovered, and as to the effect of the statute upon future assessments for taxation the court expresses no opinion.

The trouble arising from the judgment below consists in the dissolution of the injunction by which the sheriff may and will seize the property of the company, and so dispose of it as to destroy the public use or the benefits the public derive from it. This corporation, like a turnpike or railroad, can not be

seized or sold by a collecting officer, or the property necessary for its use, so as to deprive the public of the benefits to be derived from it, unless by legislative authority. This company furnishes water to nearly two hundred thousand inhabitants. Their daily wants require its existence, and that the franchises shall be operative. It is essential to the health and comfort of the citizens and the safety of the entire city, and, therefore, the chancellor, having been appealed to by the appellant for some sort of relief, should have taken cognizance of the case, and required the appellant, by rule, to pay the money into court, and if not, to place the management of the corporation in the hands of a receiver, in order that the burden might be discharged. It appears that the corporation is deriving a handsome income, and applying it to the purchase of additional ground and other property for the purposes of the corporation. They now own nearly two hundred and fifty acres of land, and can pay from the income the tax due without affecting the principal business, and whether it can or not, the tax must be paid. The property of the corporation in the city is not liable for county taxes, but that portion of it outside of the city limits, under an ad valorem tax for the county, is not exempt from county taxation, we mean taxes due before the special act of exemption was passed, as the effect of that act is left an open question, and from the case before us it is difficult to determine whether there is any question as to the county taxes before the court. If not, what is said in reference to county taxes taxes has no application. Counsel may have alluded to the question of county taxation in reference alone to the construction of the special act of exemption. The judgment is reversed, with directions to stay the hands of the collecting officer, and to enforce collection as herein indicated. If the land claimed or owned by the company is not necessary to its operations the chancellor should direct the sheriff to sell it. It will not be permitted to say that such an accumulation of real estate shall constitute such a portion of the entirety as will prevent its being sold when not necessary to the operation of the franchise.

T. L. Burnett, Russell & Barrett and Brown & Davie for appellant.

Russell & Helm for appellee.

# WOOLLEY v. LOUISVILLE BANKING CO.

## JOHNSTON v. SAME.

## THEIRMAN v. SAME.

(Filed January 10, 1884.)

1. Bar—Judgment on demurrer—When a general demurrer has been sustained, whether properly or erroneously to plaintiffs' petition and judgment entered dismissing it, as long as that judgment remains unreversed it can be pleaded by defendant in bar of any subsequent action upon the same state of facts.

2. Stock—Lien on—The fact that a wife agrees with a bank that her stock may be pledged for a particular debt of her husband's does not give the bank a lien upon the stock for any other than the particular debt.

3. Misrepresentation—Release—Endorser—Where a bank through its president induces an endorser to continue bound on A's note by representing that the bank holds collaterals of A's sufficient to secure the note, and it turns out that it holds none, the endorser and all subsequent endorsers are released from liability, though the president acted innocently and really supposed that the bank held such collaterals.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The Louisville Banking Co. (appellee) instituted an action in equity against R. W. Woolley, Jas. C. Johnston and Johnston and McDonald on a bill of exchange for $1,200, due and payable in ninety days from the 15th of September, 1877. The bill was drawn by Woolley and accepted by Jas. C. Johnston, and then endorsed by Johnston and McDonald to Jas. C. Johnston. The object of the bill was to enable Jas. C. Johnston to raise money, or rather to renew certain paper to the banking company upon which Woolley was then liable as the surety or endorser of Johnston. A final judgment was sought against Woolley, and the aid of the chancellor invoked for the purpose of subjecting to the payment of the debt certain certificates of stock that had been pledged by Jas. C. Johnston as collateral security for the payment of a note or bill for which he alone was liable, the plaintiff (the bank) alleging that by the terms of its charter it had a lien upon these collateral securities for the payment of any debt the pledger might be owing the bank; and that after satisfying the debt for which it was specifically pledged the balance should be applied to the other indebtedness of Johnston to the bank.

The bank held another note on Johnston, with Woolley and Thierman as endorsers, and sought to obtain judgment against these endorsers by an action at law.

That action was transferred without objection on the motion of the defendants, and consolidated with the equity action. Jas. C. Johnston, who was primarily liable as between the parties to the paper, was the trustee of his wife, Julia Johnston, and the certificates of stock were issued in her name, and were pledged by the husband to secure the payment of the twelve hundred dollar note for which he was liable, and upon which there was no surety or endorser. The name of Mrs. Johnston was written on the back of such certificate and the certificates attached to this note, and pledged by the husband to secure that note only. Mrs. Johnston, the wife, was made a defendant to the action in equity and the chancellor was asked to sell the collateral paper first to satisfy the twelve hundred dollar note upon which there was no surety, and then to apply the balance to the other indebtedness of her husband to the bank, upon which Woolley, etc., were liable. After describing the stock it is alleged by the bank "that all of the shares of stock stood in the name of the defendant, Julia Johnston, but were really the property of the defendant, J. C. Johnston, and paid for by him out of his own means, and she, by reason thereof, by endorsement on said certificate duly signed by her, authorized her husband to pledge the same," etc. Spratt, the trustee of Mrs. Johnston (her husband having become bankrupt), and Mrs. Johnston filed a general demurrer to the petition, insisting that the facts did not constitute a cause of action against them, or either of them. The demurrer was sustained and two weeks' time given the plaintiff to amend its petition. The appellee (plaintiff) amended the petition, alleging "that the stocks were the property of Johnston, the husband, and at the time the pledge was made to the plaintiff defendant, Julia Johnston, had no knowledge or information that such stock had been purchased in her name, or that a certificate therefor had been issued, nor had said stock, or any of it, or said certificates, or any of them, been delivered to or accepted by Julia Johnston, nor had she ever had the possession or seen any of the certificates, but sub-

sequently to said pledge her name was signed on the back of them, as used for the purpose in the original petition set out, and plaintiff says that said stock and no part thereof belongs to said Julia Johnston, nor as to plaintiff has she now, nor did she ever have, any interest therein." To this petition, as amended, a demurrer was sustained, and time having been given to amend, an order was entered reciting that no amendment having been made, it is now considered by the court that the petition and amended petition be dismissed and that plaintiff pay to Julia Johnston her costs expended, and for which execution may issue.

On the same day the order dismissing the petition as to Mrs. Johnston was entered the defendant, R. W. Woolley, who was the endorser and drawer for the husband of Mrs. Johnston, filed an answer and cross petition in which he alleges that the bank, by reason of its charter, had a lien on the stock, and that it was the general estate of the wife, and asks that it be subjected to the payment of the debt for which he was liable. It is further alleged in this answer and cross petition of Woolley that it was the understanding and agreement between himself and the bank that this stock would be held by the bank for his protection, and that it would apply the surplus to the payment of his (Woolley's) liability. This the bank denies, and Mrs. Johnston, answering the cross petition of Woolley, sets forth the trust on the part of the husband, claiming that the stock was her separate estate and purchased with her money, and denying that the stocks were ever pledged for the debt upon which Woolley was liable, and asked that the bank be compelled to surrender the stocks, and for that purpose made her answer a cross petition against the bank, her trustee uniting with her in the prayer for relief.

To this cross petition of Mrs. Johnston the (appellee) bank filed an answer and counterclaim against Mrs. Johnston and her trustee in which it relies on the same matters set up in the original and amended petitions to which a demurrer had been sustained and the petition dismissed. To this pleading by the bank the appellant, Mrs. Johnston, and her trustee pleaded in bar the judgment on the demurrer. A judgment was rendered by the chancellor subjecting the stock to the payment, first of the note of twelve hundred dollars, for which Jas. C. Johnston

was alone liable, and then to pay the debts for which Woolley and Theirman were liable, and also rendered a final judgment against Woolley and Theirman for the bills upon which appeared the names of Mrs. Johnston, Woolley and Theirman.

If the facts alleged in the petition, as amended by the plaintiff and to which the demurrer was sustained, were true it may well be argued that the plaintiff was entitled to recover, but waiving the decision of that question the court below decided that the facts alleged did not present a cause of action against Mrs. Johnston and dismissed the petition, as amended, absolutely, with a judgment for costs against the bank.

The court in effect decided that upon the facts stated the stock of Mrs. Johnston, with the certificates issued in her name, could not be subjected to the payment of her husband's debts. The principal object in going into a court of equity was to divest the wife (Mrs. Johnston) of title. The certificates of paid-up stock were in her name, and pledged to secure an indebtedness for which she was in no manner liable. And after a judgment that is final the appellee, by a counterclaim, attempts to set up the identical facts that had been adjudged insufficient in the petition, and upon these facts obtained the judgment. There may be a more minute statement of the transaction in the counterclaim than the petition, but the substance of each is that the stock belonged to the husband and not the wife, and was paid for by the husband out of his own means. There was no fraud or mistake alleged in the issuing of the stock either in the petition, as amended, or in the counterclaim. Mrs. Johnston's right to the stock by reason of the judgment on the demurrer is unquestioned, and when she required the bank to surrender the stock, the defense being similar in substance to the claim asserted in the petition, should have been disregarded and a judgment rendered for her.

"A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill if the dismission was on the hearing, and was not in terms without prejudice. (Story's Eq. Plead., section 793.) Demurrers, says Story, though sometimes for dilatory causes, in the nature of a plea in abatement, are in legal effect in bar of the suit praying for

a dismissal of it." When the case is dismissed on the merits it is a bar to another action.

"No subsequent action can be maintained by the plaintiff if the judgment be against him on the same facts stated in the former complaint. If any court err in sustaining a demurrer and entering judgment for the defendant when the complaint is sufficient the judgment is nevertheless on the merits. A judgment in favor of defendant on demurrer to an answer is a bar to a subsequent suit for the same cause of action." (Freeman on Judgments, section 267, page 368.) "The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive judgment on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court." (Freeman on Judgments, 270.)

In the case of Lamme v. Saunders, 1 Monroe, 267, this court said: "It is true the demurrer of Lamme, which was filed to the plea at law, setting out the usury was sustained by the court of law, but if we are correct the court erred in sustaining that demurrer, and to be relieved from that error the defendants should have appealed, and not resorted to a court of equity."

Where the plaintiff fails to allege any cause of action it is no obstacle to his bringing another action by alleging a state of facts entitling him to recover, but he will not be permitted, after setting forth a state of facts in his petition, whether sufficient or insufficient to authorize a recovery after a general demurrer has been sustained to his pleading and his action dismissed, to bring another action setting forth substantially the same facts, and recover where the former judgment is pleaded in bar of the recovery.

So in this case the court decided, by sustaining the demurrer, that there was no equity in plaintiff's action as against Mrs. Johnston, and when the plaintiff relied on the same facts in his counterclaim, the plea alleging a final judgment between the same parties with reference to the same subject-matter, should have defeated any recovery on the counterclaim.

Woolley had no cause of action against Mrs. Johnston or her trustee. It is not pretended that the stocks were pledged to

secure either of the debts upon which he was bound, but on the contrary it is expressly admitted in the pleadings of all the parties that the stocks were pledged alone to secure the individual note of her husband upon which Woolley was not bound.

The lien of the bank, by reason of its charter, did not extend or apply to the property of another than the debtor who had consented that his property should be pledged to secure the particular liability. If Mrs. Johnston had consented that the stocks should be pledged for one of the notes or bills, this did not give the bank a lien upon it for all the bills due and owing it by the husband. There was no fraud in the transaction, for the bank, with full knowledge of the liability of Johnston, issued the certificate of the bank stock to his wife, and, besides, no fraud has been alleged or proven by any of the creditors or the sureties.

It is shown that Johnston, the husband, had wasted the trust estate, and with the certificates of stock issued to the wife, the chancellor would have regarded the rights of a creditor to whom the stock had in no manner been pledged as subordinate to the rights of the wife. So neither Woolley nor Theirman have any claim as against Mrs. Johnston nor any equitable right to subject this stock to the payment of their liability, and, besides, as there was no pledge of the stock for the debts upon which Woolley and Theirman were liable, their lien, if any, must be derived through the bank, and it is manifest that the bank had no lien regardless of the judgment that denied the right of recovery.

Woolley complains of the final judgment against him for the reason, as is alleged in his original and amended answers, that he was induced to continue his liability on the paper of Johnston by reason of the statements of the president of the bank to him that he held the collaterals of Johnston, and that they should be applied to protecting him as the endorser or drawer after the extinguishment of the $1,200 note. Not only a representation but an express agreement to that effect is alleged by Woolley in his amended answer, and that this constituted the inducement for the renewals of the paper; that he was ignorant of the fact that the collaterals were in the name of Mrs.

Johnston, and relied upon the statements of the president of the bank that Johnston was the owner. It is shown by the president of the bank that the money, or the most of it that was applied to the payment of the stocks purchased, was derived from bills discounted by Johnston, and for that reason he regarded Johnston as the real owner. These facts were not communicated to Woolley, but on the contrary he was told by the president that the collateral belonged to Johnston. Woolley so swears, and his statements are not denied by the president or any officer of the bank. The president, when examined in reference to Woolley's statement, says: "If I spoke of the stock at all, I would naturally have spoken of it as Johnston's, and not as his wife's, for I did not consider it hers, and I could very naturally have said that Johnston would not be permitted to transfer the stock while he was in any manner liable to the bank, but this could only have applied to the bank stock."

Woolley is not contradicted at all by any of the officers of the bank with reference to this branch of the controversy, and the only conflict in the testimony is as to the promise of Woolley to pay after the bankruptcy of Johnston took place, which does not affect the question involved. It matters not how innocent the bank officers may have been of a purpose to wrong the endorsers if the president of the bank induced Woolley to continue his liability by assuring him that the bank held collaterals of Johnston to secure the debt, and it turns out that the bank held none, the surety is released, and the release of one operates to release all.

The proof shows not only that the stocks were issued to Mrs. Johnston, and so appeared when they were pledged, but the chancellor has decided, by a judgment final as between the bank and Mrs. Johnston, that the stocks can not be subjected to the payment of these claims. The officers of the bank admit that they knew that the certificates appeared in the name of the wife of Johnston, and in fact the certificate for the bank stock was issued as paid-up stock by the bank now litigating Mrs. Johnston's right to it. The certificates show that the stock was fully paid for and that Mrs. Johnston was the owner, so there can be no escape from the conclusion that it was the duty of those representing the bank when speaking of the col-

laterals at all to induce a continuance of the liability of the surety, to have disclosed the fact that the stock pledged, as appeared from the certificate, was in the name of the wife of Johnston.

It is a settled rule of law that a creditor is bound to hold for the surety any securities he may receive from the principal to secure the debt for which the surety is bound, and certainly where the creditor represents that he has collaterals, when he has none, as an inducement to one to become or continue his liability as surety, the creditor must suffer and not the surety. The president knew that the collaterals stood in the name of the wife, and while the transactions between him and Johnston may, and doubtless did, lead him to believe that it was Johnston's stock, still the injury to the surety is the same. The facts should have been disclosed when offering the inducement, and particularly when they were within the knowledge of the officers of the bank, and Woolley ignorant of their existence. These parties all trusted Johnston under the belief that he was able to meet his engagements, and when he became embarrassed the property of the wife, and she seems to have been the real sufferer, is sought to be made liable for the payment of his debts. Woolley was the prior endorser on the paper and his release discharged Theirman, and if they had been co-sureties it would make no difference.

On the law and facts of the record a judgment should have been rendered for Mrs. Johnston for the stock and dividends unappropriated at the date of the judgment on the demurrer, and dismissed as to Woolley and Theirman.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

R. W. Woolley, Beattie & Winchester, Bijur & Davie and P B. Muir for appellants.

Barnett, Noble & Barnett for appellee.

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## HELM'S EX'OR v. ROGERS.

(Filed January 22, 1884.)

**Limitation—Trusts—The statutes of limitation do not apply to express or continuing trusts which are exclusively cognizable in equity. When the chancellor is asked to enforce such trusts and the existence of the trust is**

**acknowledged, lapse of time is no bar to the action, but if the trust is denied and there has been gross negligence in enforcing the right or long acquiescence in the adverse claim, equity will act on the policy of discouraging antiquated demands, and will refuse relief.**

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Hargis.

It is well settled in this State that the statutes of limitation do not apply to express and continuing trusts which are exclusively cognizable in equity. Such trusts are not embraced by the letter or spirit of any part of the existing statutes of limitation, hence they are subject to the rules of equity which nearly always bear some analogy to the law on the subject of limitation, and when such analogy can not be safely followed they act upon their own inherent doctrine of discouraging antiquated demands, when there has been gross neglect in prosecuting rights or long and unreasonable acquiesence in the assertion of adverse claims. The general rule that lapse of time constitutes no bar in cases of express and continuing trusts, over which there is no jurisdiction at law, has several qualifications.

Lapse of time is ineffectual as a bar where the relation of trust is acknowledged to exist between the parties, and its continuance unbroken. This may be considered an elaboration, and fuller explanation of the rule merely. But where the relation is denied or time and acquiesence has obscured the nature and character of the trust, or the acts of the parties or other circumstances authorize a presumption unfavorable to its continuance, relief will be refused on the ground of lapse of time and inability on the part of the chancellor to do complete justice. (Story's Eq. Jur., sections 1520, 1520a.)

In cases where no statute of limitation governs a defense peculiar to courts of equity may be founded upon the mere lapse of time and staleness of the claim. This rule is for the peace of society, and is enforced by the court refusing to interfere. (Story's Eq. Jur., section 1520; Maddox, &c. v. Allen, 1 Met., 495.)

Admitting, therefore, that this case presents what would be an express or continuing trust were limitation and payment not pleaded, we are nevertheless of opinion that from the fact that the continuance of the relation of trustee was openly

denied upon the ground of payment of the trust fund to the cestui que trust, and she acquiesced in the assertion of payment for eight years, and long after the trustee was dead and the means and evidence of payment lost or obscured, she is not entitled to the active interference of a court of conscience when so many circumstances lead to raise a strong presumption of actual payment.

About 1840 John L. Helm, who was twice governor of this Commonwealth, and whose conduct as master of appellant Hester, now over eighty years old, showed him to have been kind and indulgent, permitted her to leave his home and go to that of her husband, a free man of color, and there remain as his wife on condition that she should be maintained and provided for. She was furnished with articles and little comforts and sent to her husband's home to act the part of a free wife with the drudgery of slavery lifted from her shoulders, though she was in fact a slave and the lawful property of John L. Helm.

She remained for eight or nine years, when her husband died, leaving land and personalty without making any provisions for her support. Her old master, whom she had nursed in his childhood, again came to her relief, took her back to his home, where she did about as she pleased, fed, clothed and cared for her until 1865, when she was emancipated with the rest of her race. Shortly after her return from the dead husband's domicile, penniless and unremembered by him, John L. Helm procured an act of the legislature in 1850 to allow her one-third of the value of her deceased husband's real estate, after payment of his debts, his property being in some danger of escheating to the Commonwealth. A decree was rendered in pursuance of the act, and $125 were paid to Gov. Helm as her trustee July, 1850. For this sum and its interest Hetty brought this suit in 1874, twenty-four years after its receipt.

In 1865 or 1866, when Governor Helm was alive, she caused the agent of the Freedman's Bureau to demand this money of him. He declined to pay it because he said he had paid her, and overpaid her, in small sums at times whenever she would demand it, which was quite frequent. She made no further effort to assert this claim until long after Governor Helm's

death, which occurred on the 8th of September, 1867. Now after the kind and generous master, who made her practically free though legally a slave, gave her the dignity of wife and the comforts of a husband, cared for her when she was bereft of that relation, is dead and the evidence unknown or forgotten, by which we are satisfied it could once have been proven that he had more than paid to and for her the trust fund, she comes and asserts this stale claim against his estate without making the affidavit purging her claim as required by law, still adhering to the old affidavit condemned on the former appeal, that there is no "just offset" to her claim, which she attempted to verify after the passage of the General Statutes. It comes too late; it is tainted with suspicion now; the circumstances, with the lapse of time, raise a strong presumption of its payment, and the chancellor ought to have so held.

Wherefore, the judgment is reversed and cause remanded for further proper proceedings.

Wilson & Hobson for appellant.

Samuel McKee for appellee.

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## EASUM v. PIRTLE.

(Filed January 19, 1884.)

**1. Conveyance—Voluntary—Fraudulent—Where A has conveyed land to his son in consideration of a certain sum and of the son's undertaking to support him and his wife, Held—That the fact that part of the consideration of the deed is the undertaking by the grantee to support his parents does not make the deed fraudulent as to creditors, or voluntary, if the son has, besides, paid the full value of the land as part of the consideration. Inadequacy of consideration is a badge of fraud, but evidence is admissible to show that the grantee paid the full value of the land over and above the agreement for support.**

**2. Fraud—Limitation—Where creditors suffer twelve years to pass before they attack a conveyance as fraudulent the court will not act upon a mere suspicion of fraud, even though the grantee put in no plea of limitation.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

In April, 1869, an execution issued on a judgment rendered in favor of Henry Pirtle against Herman Easum and was returned no property found.

After that time Easum became the owner of a tract of land in Jefferson county, containing about one hundred acres. In January, 1872, Easum, being indebted to Charles Easum in the sum of $864, sold to him this land for $2,000, and executed to him a bond for title. The son took possession, and has claimed to own the land since that time. The father died suddenly in 1875, and his administrator filed a bill in equity for the settlement of his estate, making Charles Easum a defendant, and alleging that a part of the purchase money was unpaid, and the court adjudged there was still due on the land about $490—$151 of this sum was paid into court and the balance paid to his mother, who was asserting claim to dower. Charles had paid his father, in what the latter was owing him and for other debts due by the father, near the sum of $1,500 before the action for a settlement of the estate was instituted. The purpose of the sale from the father to the son was to pay the indebtedness of the father, and there is nothing showing that the son knew of the suit in controversy and an entire absence of proof showing that the object of the conveyance was to defraud any one. We must assume from the record that the conveyance was made in good faith, and is neither actually nor constructively fraudulent unless the additional consideration expressed in the bond, that the son would support and maintain his father and mother during their natural lives, renders it fraudulent as to antecedent creditors. The deed was not voluntary if the appellant paid the actual cash value of the property, although he may have also agreed to support the father and mother as long as they lived. It seemed that they owned no other estate, and the natural obligation on the son to provide for his parents, and his desire to secure his debt, no doubt caused the insertion of the covenant in the deed by which the support of the father and his wife formed part of the consideration. Fifteen hundred dollars, it is alleged and proven, was the full and fair value of the land; and if so the creditor has not been injured, and no presumptive or constructive fraud can well exist where the purchaser buys in good faith and pays the full value of the property. If the amount paid was less than the value of property or the intention to defraud was shown, there could be no doubt as to the right of the creditor to subject the property to the payment of his debt. In

every case where the deed or bond has been held to be actually or constructively fraudulent the rights of the creditors have been in some manner affected by it. In what particular can the creditor say he has been injured in this case? A sale has been made in good faith and for the full value of the property, and the consideration paid. Suppose the obligation to support the family had been omitted from the deed, will it then be insisted, when the full value of the property has been paid in money, upon a purchase made in good faith, that the deed is nevertheless constructively fraudulent? The additional obligation to support the parents of the appellant may conduce to show that the property was worth more than the $2,000, but in this case it seems to be conceded, as well as established from the facts, that the property for which $2,000 was paid was worth only $1,500. Inadequacy of consideration is a badge of fraud, and an agreement to support the debtor and his family, although a valuable consideration between the parties to the instrument, is not good against creditors. "Evidence, however, may be given to show that the grantee paid the full value of the property, and that the reservation of the right to a future support is of no value to credtors." (Brown on Fraudulent Conveyance, 217.) In Albee v. Webster, 16 N. H., 362, the father conveyed his land to his son to secure the latter on a debt due him and in consideration that the son would pay off other debts, the conveyance further reciting that the son should support the father for life. It was held that the deed was valid as to creditors upon the ground that the monied consideration paid was the full value of the property, and the creditor was in nowise injured. The burden assumed by the son in this case, as in the one cited, does not prejudice the rights of creditors. The case of Slater v. Dudley, 18 Pick., 373, was where the father conveyed to the son his farm, the son paying the full value and also agreeing to support the father. The court established the deed because the full value was paid regardless of the obligation to support his father. In Henderson v. Hunton, 26 Gratt., 926, a similar question was determined, upholding the conveyance as against creditors. In this case the son supported the father until his death in 1875, and was in the possession of the farm, claiming it as his own

under his purchase, and no effort on the part of the execution creditors to make his debt from 1869, when the execution was returned no property found, until this action was filed by him to subject the land in 1881, and although limitation is not presented as a bar to the proceeding, the chancellor would not permit, after such a lapse of time, a mere suspicion as to the fraud of the transaction to control his action, but the facts of this case seem to be so well established that it is difficult even to entertain a doubt as to the good faith of the parties. In Hawkins v. Moffit, 10 B. Monroe, 81, relied on by appellee, a young man involved in debt transferred an estate worth $1,169 for a consideration not exceeding $500 and for maintenance for ten years. To sanction such a contract would be permitting the debtor to exhaust his entire estate in the payment of his board and clothing at the expense of creditors and must necessarily be held to be fraudulent.

The father in this case, or his estate, was indebted to the son in the sum of $120 borrowed money; $120 expenses to New York; $80 funeral bill, etc., all of which, together with other smaller items, were applied as a credit on the land debt and in a settlement of the father's estate, made prior to the institution of appellee's claim. The credits were properly given, so far as this record shows, and if the debt for the land was in good faith paid before this action was filed no recovery can be had. If the price agreed to be paid was its full value, why the bond for title is not good with the purchaser in possession, as against creditors and purchasers, if not fraudulent, we can not see. Here the bond was given, the purchaser placed in the possession, and there remained for many years before appellee brought this action. As the case seems to have been decided in the court below upon the legal questions involved, the appellee, if he desires, may, within a reasonable time, take proof as to the consideration paid for the land. If the consideration was the full value of this land, and paid by the appellant in the discharge of debts due him or others by the testator, or for debts for which the estate was liable, and paid by the appellant before this suit was instituted, the judgment should

be for appellant. Judgment reversed and cause remanded for proceedings consistent with this opinion.

Brown & Davie for appellant.

Shackleford Miller and John Stites for appellee.

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## BULLOCK, &c. v. CALDWELL.

(Filed January 22, 1884.)

**Construction of deed—Where a father conveys land to his daughter and her children forever, she does not take an estate for life with remainder to the children, but she, with the children, holds the land as joint tenants, and it is immaterial for this purpose that the names of the children were not inserted in the deed.**

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Pryor.

The conveyance in this case is to Nannie S. Bullock and her children, of the second part, to have and to hold said tract of land to the parties of the second part, their heirs and assigns forever. The conveyance is from the father to the daughter and her children. Under this conveyance the parties of the second part hold as joint tenants. What effect the conveyance would have as to after-born children is not a question before us, but it is manifest that the children living were parties to the deed, and took a present interest in the property conveyed. The fact that their names were not inserted in the deed does not authorize the conclusion that the mother was the only contracting party, or that the grantor intended to confine the present interest to the daughter alone, to the exclusion of the children. (Powell v. Powell, 5 Bush, 619.)

In Davis v. Hardin, 80 Ky., 672, this court said: "A father making provision for his child, and that child's children, may well be supposed to have intended them to take jointly. They are all of his blood, and the natural objects of his bounty. If others were named in such a grant than the children, there would then be no room for construction; and because the word children is used affords no reason for inferring an intention on the part of the grantor to make a different disposition of the

estate than the plain language of the instrument indicates, and then to reverse the rule when applied to strangers, for the reason that such a conveyance is susceptible of but one construction."

Nor is there any reason to suppose that the draftsman would employ such language in a conveyance when the grantor's purpose is to give or grant the estate to the daughter for life, remainder to her children. No one competent to reduce to writing the substance of an ordinary business transaction between parties would overlook the wishes of the grantor in using the language found in this deed if his purpose was to create a life estate in the daughter, with remainder to her children. The object in construing instruments of writing like this, whether in a grant or devise, is to ascertain the intention of the party making, and while the words for life may not be used in the conveyance, there may be other terms or expressions or such a relation between the parties as would indicate a plain intent to limit the interest conveyed, or to grant to one in the same instrument a less estate than to another, but here the conveyance is to Nannie Bullock and her children, in consideration of love and affection, with the clause to them and their heirs forever, so there is nothing on the face of the deed to indicate a purpose to convey any other than a joint estate to the parties of the second part. In the case of Davis v. Hardin, supra, this court said that the instrument must be read in the light of surrounding circumstances, and, therefore, where a husband conveyed to his wife and their children there was less reason to suppose that he intended them to take as joint tenants, whereby his bounty might, by death of his wife, pass into the hands of a stranger, even against himself, than in a case where the conveyance was from the father to his daughter and her children. We think the court below erred in determining that the daughter took a life estate. She held as a joint tenant with her children. Judgment reversed and cause remanded for proceedings consistent with this opinion.

J. H. Holliday and J. P. Norvell for appellants.

E. C. Phister for appellee.

## GAY v. HANKS, &c.

(Filed January 17, 1884.)

**Appellate practice—Court of Appeals having transferred a case of which Superior Court has jurisdiction to that court will not afterwards entertain a motion to set aside the order of transfer and dismiss the appeal. Superior Court having exclusive jurisdiction of the appeal, must determine all motions affecting the rights of parties under the judgment.**

Appeal from Powell Circuit Court.

Opinion of the court by Judge Lewis.

This court, in the case of Gasaway, &c. v. Wood, &c., 9 Bush, 72, in construing the act, entitled "An act to exempt homesteads from sale for debt," approved February 10, 1866, held that the act in exemption continues the benefit of the exemption to the widow and children after the death of the husband; and if there should be no children the widow is still entitled to the homestead, as her right to the benefit resulting from the enactment is not made to depend upon any such contingency.

The General Statutes were enacted after that case was decided, and by section 14, article 13, chapter 38, it is provided that the homestead shall be for the use of the widow so long as she occupies the same; and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age. That provision is in harmony with the decision rendered in the case of Gasaway, &c. v. Wood, supra, and under it the widow is entitled to the homestead, whether the husband leaves infant children or not.

The act, entitled "An act to amend section 16, article 13, chapter 38 of the General Statutes," approved March 15, 1876, as is shown by the title as well as by the language and in the body of it, was intended to amend section 16 only, but not to change in any respect section 14 or to affect the rights secured by it to widows.

The husband of appellant acquired title to the land in controversy in this case and was occupying it as a bona fide housekeeper with a family before the debt was created, for the payment of which it was adjudged to be sold, and continued to occupy it until his death.

He left at his death appellant, his widow, and an infant child who died in a few weeks after his father. But the right

of appellant to the homestead was not impaired by reason of the death of the infant, but continues so long as she occupies the same.

By law the land may be sold subject to the homestead right of appellant for the purpose of paying the debts of her husband. But it was error in the court to adjudge her entitled only to dower, and direct the land sold subject to her dower.

The judgment is, therefore, reversed and cause remanded, with direction to set apart to appellant as her homestead the land, or so much thereof, including the dwelling house and appurtenances, as does not exceed in value $1,000, and for further proceedings consistent with this opinion.

W. H. Holt for appellants.

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## LOUISVILLE & NASHVILLE R. R. CO. v. CONNELLY.

(Filed January 24, 1884.)

**Homestead—Under General Statutes, chapter 38, article 13, section 14, the widow is entitled to a homestead after her husband's death, though there should be no children; or if there are children, and they die, her right continutes after their death.**

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hargis.

This case by mistake was appealed to the Superior Court when the appeal was granted by the court below to the appellate court. The Superior Court struck it from the docket; thereafter the appellant sued out an appeal from this court and moved to transfer the case to the Superior Court, which has jurisdiction of the case, the amount of the judgment being just $3,000, that motion was sustained. The appellee now moves to set aside the order of transfer and dismiss the appeal because the transcript was not filed twenty days before the second term after the appeal was granted. These motions can not be acted upon by this court because the Superior Court has exclusive jurisdiction of the appeal, and consequently of all motions which might destroy or affect any right of the parties under the judgment. This court has no power to do anything but transfer the case.

The motions are, therefore, overruled without prejudice to their repetition in the Superior Court.

M. J. Dudley and W. Lindsay for appellant.

O'Hara & Bryan for appellee.

## ELMORE v. ELMORE'S ADM'R.

(Filed January 25, 1883.)

At the time the following decision was rendered we published an abstract of it, but our attention has been called to it as involving a principle important enough to demand its publication in full.

**Homestead—In Watson v. Christian, 12 Bush, 524, it was held that if the widow accepts the devise made to her by her husband of his estate she is barred of homestead. In this case it is further held that by accepting such devise she bars the children's right to the homestead, which is a joint one with her's, as well as her own. If, however, she should abandon the homestead or die the right of the chilldren is continued.**

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

In the case of Watson v. Christian, 12 Bush, 524, this court held in effect that at the death of the husband the right to the homestead passed to the widow, with the right of the infant children to occupy it jointly with her, but further held that the widow, in accepting the provisions of the husband's will devising her his estate, waived her right to a homestead. The widow accepted the provisions of the will in this case, and, therefore, has no right of homestead, and if she has no homestead the children under such a state of case can have none. If the children have an interest distinct from that of the mother (the mere right to occupy it with her), then the widow could accept the provisions of the will, thereby losing her homestead, and the children claim the homestead by reason of their interest regardless of the rights of the mother. We should then have the widow with property she had taken in lieu of the homestead, occupying it, or with the right to occupy it, and the infant children in possession of and claiming in their own right the actual homestead, and this would in effect be creating two homesteads in the same estate. Where the widow, being entitled to and in the possession of the homestead, dies or abandons it, her failure to occupy it does not affect the rights of the children, but her acceptance of dower, ora ny interest devised to her in lieu of homestead, destroys the homestead as to both the mother and the children. Following the case, therefore, of Watson v. Christian, supra, which has been recognized in subsequent cases, the judgment below was proper, and is now affirmed.

John Bennett for appellant; C. F. & A. R. Burnam for appellee.

## KENTUCKY SUPERIOR COURT.

### FOGG'S ADM'R v. ROGERS, &c.

(Filed January 24, 1884.)

**1. Sale of goods—Warranty—Where goods are sold by sample or by description, but without any express warranty as to quality, goods of the kind or quality sold must be delivered before the seller can recover the price. Warranty in such cases is not necessary to protect the purchaser.**

**2. But where goods are sold not by sample or description, but the goods themselves are present in bulk so that the buyer can examine them before buying, the vendor may recover the price, notwithstanding any failure in the kind or quality of the goods, unless their nature or condition was such that they could not be examined at the time of the purchase, therefore, where A sold as hemp certain stacks standing in the field, and the stacks looked at from the outside were apparently composed of hemp, but being afterwards taken to pieces the inside was found to be straw, Held—A could not recover the purchase price, though he had made no warranty and the purchaser saw the stacks when he bought them.**

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Bowden.

The pleadings admit that the appellant, as administrator of E. Fogg, sold to the appellee twenty-three stacks standing in the field and that the stacks were sold at auction as hemp, and that the note sued on was given for these stacks, an additional item of $1.25 being also embraced. Rogers alleged that the administrator represented and warranted the stacks to be stacks of hemp, to which the administrator replied, denying "that he made any warranty or representation concerning the stacks of hemp sold to the defendant." It may be doubted if this denies that he warranted or represented the stacks to be hemp. The admission that the stacks were sold as hemp seems necessarily to admit that they were represented to be hemp, so that the denial that any representation or warranty was made concerning the hemp sold should apparently be understood as meaning only that there was no warranty or representation concerning its quality or condition. Rogers did not complain that the hemp was unsound, or that it was of a poor quality, but that the stacks, sold and represented as hemp, were in fact stacks of weeds; that they were not the same in kind as that which they were represented to be, and were worthless.

There was evidence that weeds composed fully eighty-five per cent. of the stacks; that they were chiefly in the middle, and that the outside of the stacks looked like hemp. It appeared that Rogers, in a few days after the sale, began to spread the stacks, and finding they consisted chiefly of weeds, he left them in the field and notified the administrator that he would not take them, and that they were subject to his order. The jury were of opinion that the stacks did not have the distinctive character of hemp, but were substantially stacks of weeds, and returned a verdict for Rogers, except as to the item of $1.25.

When a contract is executory, being for the sale and delivery of an article described, whether by written or oral language or by a sample, which is only a mode of describing, it is clear that the purchaser can not be required to accept that which he did not agree to buy, whether the difference lies in kind, quality or condition. Exact performance, or its offer, is the condition of the seller's right to recover. Nor will the delivery of a thing different in kind, quality or condition be a performance unless so accepted; the buyer may within a reasonable time after discovery return the thing, or he may recover indemnity. In such cases a warranty does not seem necessary to the protection of the buyer, who may rely safely on the terms of the contract itself; nor does anything pass by the contract to which the collateral contract of warranty could relate.

When the contract is one of bargain and sale, the intent being thereby to pass the title to a thing in being and then identified, the seller is bound by the law of good faith and by the terms of his contract; but if he acts fairly he becomes liable on account of the kind, quality or condition of the thing sold only so far as he has consented to be bound, except in a few cases when public considerations have implied a warranty, and even in these cases it seems that the warranty may be fairly regarded as a stipulation of fact tacitly understood.

When the seller agrees in terms to warrant there can be no doubt he is liable as far as the warranty extends. It is now well-established law that any statement of a fact, as a fact, made by the seller pending the negotiation upon which the buyer relies, if it is such as to induce reliance, is an express

warranty; but that mere words of praise and commendation create no liability; to constitute a warranty they must be such as to import an undertaking on the part of the owner that the thing is as represented; they must be stipulatory. In the application of this rule courts have not uniformly placed the same value on the same or similar language; that which in some cases is held to import an undertaking has been in others regarded as merely a commendation.

Nor is there a perfect uniformity as to the extent of the warranties when their existence is admitted. As the liability arises out of an express contract it seems that it should go no further than was intended; and where a matter is plainly to be seen, it is improbable that either party intended a warranty that it was otherwise; and so it seems that when it is said that a general warranty does not cover apparent defects, it is merely a rule of construction. If the appearance, however, is such as to raise a doubt as to the fact, and the terms of the warranty are broad enough to cover it, it seems it should be held to include it, since it is probable that security against the uncertainty of conjecture was intended. When the terms of the warranty are broad enough to cover a given defect and it is excluded by this rule of construction as not having been intended, though there may be no evidence that the buyer was in fact cognizant of it, the effect is merely to place a limit to the warranty, within which the seller is bound and beyond which the buyer is affected by the rule caveat emptor. The seller is not bound by his warranty because it is held not to exist with reference to the excluded defect; the buyer is without remedy because he did not take care to exact a warranty respecting it. But it can not be said that the warranty is not binding with regard to every defect it includes because the buyer has failed to take care; his reply is that he had taken an express warranty as a substitute for his care; that having that guaranty he needed not to put himself to trouble.

In determining the extent of the warranty—that is, in deciding whether it shall or shall not be constructively limited by the consideration that it was not presumably intended to include matters which the buyer could discover—the point of inquiry is whether the defect was ascertainable. If the thing

is absent when sold and can not be seen, the buyer can not take care; he must rely on the description given by the seller, and, therefore, it should be regarded as a warranty to the full extent of the description; but if the thing is present its nature may be such that use alone can determine even its species, as in case of seeds having similar appearance, or such that only time or a chemical analysis can decide. There can be no reason to distinguish between causes producing the same result. If the buyer is precluded by the condition or the nature of the thing it is the same as if he was precluded by its being inaccessible, and in such cases the terms of the warranty should not be limited.

Indeed it seems that an offer to sell a thing described, where that description is not susceptible of verification, and where, therefore, the buyer is not called on to consider if, regarding the thing itself, any part of that description is to be taken as mere commendation, is in effect an offer to sell a thing such as is described, an acceptance of which makes the description a part of the contract; and while the distinction between a contract to sell and deliver and contract of bargain and sale is clear, yet so far as concerns the question now considered its value is not very evident. A description by words or sample of a thing to be delivered is part of the contract; the seller may not substitute another thing either in kind or quality for that which he has agreed to deliver. If he does so he does not perform his contract, and is liable in an action by the purchaser. So if one sells a thing affirming it to be of a particular kind or quality, that affirmation as a warranty should pass with the thing sold, and in such cases a description should have the force of a warranty, subject only to the limit fixed by the rule of construction referred to.

Seixas v. Woods, 2 Caines, 48, where peachum wood was sold for brazilletto, and Swett v. Colgate, 20 Johns., 196, where kelp was sold for barilla, upon which appellant's counsel relies, have been repeatedly rejected, not only by the courts of New York, but of other States. In Hawkins v. Pemberton, 51 New York, 198, the auctioneer stated that the article then offered was "blue vitriol;" it was in fact a mixture called saltzburgur vitriol, containing some blue vitriol, the greater

part being green vitriol. The purchaser examined it before the sale; it had the appearance of blue vitriol, but it was not possible at the time of the sale to discover its real nature, an analysis or a few hours' exposure being necessary for that purpose. It was held that the statement that it was blue vitriol was a warranty that it was so, the court saying "that when a buyer purchases an article whose true character he can not discover by an examination which it is practicable for him to make at the time, he may rely on the positive representation of the seller as to its character as well as to its quality and condition." In this case it was impossible for the purchaser to examine so as to ascertain the fact of species, and the warranty was held to cover it. In White v. Miller, 71 N. Y., 118, seeds were sold as "large Bristol cabbage." While it does not appear that particular seed were sold and delivered, the court held it as a "bargain and sale of a chattel of a particular description," which imported "a contract or warranty that the article sold is of that description." Allen v. Lake, 18 Ad. & E., 560, is to the same effect. In Borekins v. Bevan, 3 Rawle, 23, the defendant sold to the plaintiff a cask of paint as and for blue paint, which had been sent to him for examination before the sale. This was a sale executed after an opportunity to examine. The court said that when the article didn't correspond in kind the purchaser had the right to say it was not the article he contracted for, whether he complains at the time of the delivery or after, unless his conduct amounts to a waiver of his right to indemnity, and that this applies to executed as well as to executory sales, referring to the fact that in Hastings v. Lovering, 2 Pick., 221, the court ruled the case as one where the contract was executed. In Osgood v. Lewis, 2 Har. & Gi., 495, a statement that the oil was "winter pressed" was held to be a warranty. In Henshaw v. Robbins, 9 Met., 83, the article was sold as Manila indigo. It was examined by the purchaser before he bought, and it was then delivered. Claiming that it was not indigo, but another and worthless article, the purchaser returned it and demanded the money he had paid. It was held he could recover. The trial court told the jury "that the bill of parcels contained a warranty that the article was indigo, and that if they were satis-

fied it was not indigo, nor known to merchants nor to the market as indigo, and was worthless, and that the plaintiffs in a reasonable time returned the article to the defendant and demanded the price, and if the article was so prepared and presented such an appearance as would deceive skillful dealers in indigo, they should find for the plaintiff." This instruction was approved, subject to the criticism that the purchaser "was not bound to exercise his skill, having an express undertaking from the vendor," citing Bradford v. Manly, 13 Mass., 139; Tye v. Fynmore, 3 Camp., 461; Shepherd v. Kain, 5 B. & Ald., 240.

These and other cases in which the same rule was recognized apply as well where there are no written bills or parcels after the sale. It is clear, and it has been decided, that such writing is not itself the contract of warranty, but only evidence of it made out after the sale had been made and the oral warranty had been effective.

This case was fairly submitted to the jury under instructions substantially conforming to this rule. It may be observed that the giving of instruction in regard to fraud did the appellant no injury because it told the jury that before they could consider the question of fraud they must find that the stacks were nearly all weeds and not hemp, and that this fact could not be ascertained by ordinary diligence or prudence, and that the defendant bought in ignorance of it (it being admitted by the pleading that the stacks were sold as hemp). Under the rule laid down that finding, independent of fraud, entitled the defendants to their verdict.

The judgment is affirmed.

Porter & Wallace for appellant.

D. L. Thornton for appellee.

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## THE SOCIETY OF ITALIAN UNION AND BROTHERHOOD v. MONTEDONICO.

(Filed January 11, 1884.)

1. Corporations—Expulsion—Injunction—Where a corporation has been enjoined from expelling a member, but proceeds to expel him in disregard of the injunction, it is not only liable to the court for contempt and to the injured membe for damages, but the act of expulsion is also null and void.

**2. The chancellor may perpetually enjoin a corporation from expelling a member on account of particular acts of his, alleged to be in violation of its constitution.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Richards.

The vice chancellor having adjudged the proceedings expelling appellee as a member of a charitable corporation to be void, the society and its officers have appealed.

The corporation is authorized to "own such real or personal property as may be necessary for the proper enjoyment of their corporate rights, not exceeding $20,000 in value; * * * and the net profits of the business and operations of said society shall be for the material aiding and assisting of the members and their families when in sickness, trouble or distress, and such other means as are usually resorted to by benevolent associations in the country."

As these are the sole purposes of the organization so far as they are embodied in the charter, it is evident that this is but one of the many benevolent societies that exist among the people of this country, the members owning no specific shares or portions of the corporate property.

This court has already, in the case of Hitter v. The German Roman Catholic St. Aloysius Society, 4 Ky. Law Rep. and Jour,. 871, recognized the rule to be that where a member of such a society, after notice and trial, has been expelled according to the provisions of the charter or the constitution and by-laws, the courts will not attempt to revise the action of the tribunal of his own selection.

But there are other questions involved in this appeal, reaching beyond the principle just announced. It seems that the society has twice voted the expulsion of the appellee, and the vice chancellor has also adjudged the proceedings in the first instance to be null and void. The first judgment was entered May 17, 1881, and on May 20, which was within the fifteen days the Code requires shall elapse before a decree of the Louisville Chancery Court can be executed unless otherwise ordered, the society notified Montedonico to appear and defend himself on the following night. On May 21 he commenced this action,

and obtained a temporary injunction restraining the society from taking the steps contemplated for his expulsion. Although a copy of this order was served in the afternoon of May 21, the society nevertheless proceeded, and on the same night, utterly disregarding the injunction, again voted his expulsion. The appellee having amended his pleadings and set out these facts, the proof was heard and the judgment appealed from was rendered.

In Turner v. Gatewood, 8 B. Monroe, 613, the sheriff had proceeded with a sale that had been enjoined. The court, through Marshall, C. J., said: "Such injunction, if efficacious at all, must make it wrongful for the creditor and the officer having the execution to proceed and sell and deliver the property referred to, though he may have levied on it before the injunction was granted. And we are of the opinion that such sale and delivery, with due notice of the injunction, being an abuse of the authority conferred by law through the writ of execution, must be regarded as making an officer a trespasser ab initio." The principles announced in Keith v. Wilson, 3 Met., 210, and Lockridge v. Biggerstaff, 2 Duv., 281, are in accord with this doctrine.

In Farnsworth v. Fowler, 1 Swan., 1, an injunction issued against the execution of a writ of possession had been disregarded. The court said: "As to the effect of the writ we may observe that it is directed to the defendant, and its action is upon him in personam, and it renders it unlawful in him to do the thing therein prohibited, or to fail or omit to do the thing therein commanded. The act being unlawful is to be deemed ineffectual and unavailable, and, as to the purpose intended, as though it had not been done."

So in Kincaid v. Dwinelle, 59 N. Y., 553, the court said: "A corporation enjoined from the exercise of corporate franchises and deprived of its property is as if it did not exist for the practical purpose of its creation.'

An election had by a corporation in violation of an injunction was held to be void. (People v. Albany, &c., 1 Lans., 308; 5 Lans., 25, 30.)

Hilliard on Inj., page 167, says: "Where an injunction is issued to restrain individuals from particular acts in pais, a

violation of the order by them will render them liable for a contempt, and also render the act voidable as between all parties to the act, as well as those claiming under it who are chargeable with notice," citing Taylor v. Hopkins, 40 Ills., 442.

A different doctrine would render wholly ineffectual the chancellor's effort to restrain a contemplated wrong. Where he has issued his order commanding the defendant not to do a particular thing, the party so enjoined can not disregard the injunction without becoming liable for the damages resulting from his acts, and also subjecting himself to punishment for contempt. But this is not all; the acts of the defendant in violation of the restraining order being unlawful, will be declared null and void at the option of the injured party. To this extent must equity go in order to make the writ of injunction a shield to wholly ward off the threatened injury.

In the case at bar, before the meeting of the society on the night of May 21, 1881, it had notice of the chancellor's order forbidding any other steps towards the expulsion of the appellee. The attempted expulsion was, therefore, unlawful, and the court properly adjudged the proceeding in relation thereto to be null and void.

But it is insisted that the vice chancellor has exceeded his authority by perpetually enjoining the society from trying the appellee upon the charges of promoting its dissolution and pronouncing an insult in the assembly.

When the first controversy arose in the society the charges were oral, but before action was taken thereon they were reduced to writing and signed by one of the members. These written charges embodied the substance of those upon which the corporation acted on the night of the 21st of May. The court in its former decree not only declared null and void the proceeding upon these first charges, which had also resulted in expulsion, but enjoined the society and its officers from interfering with Montedonico in the exercise of his rights as a member. In entering this first injunction the language of the final decree is in substance the same as that of the judgment now complained of. If the injunction in this case can be construed as perpetually enjoining the society from trying appellee upon those charges, that in the old case must receive the

same construction. As the judgment in the former case was never appealed from, but remains in full force and effect, it would necessarily follow that the society is, independent of the judgment now complained of, perpetually enjoined from trying the appellee upon the charges in question.

But we do not think the language of either decree can be properly so interpreted. The opinion of the vice chancellor in the first case is not made a part of the record in this, but the judgment having declared null and void the proceedings theretofore had for the expulsion of Montedonico, can only be considered in its subsequent parts as restraining the society from making said proceedings a basis for denying him the rights of membership; and the same interpretation must be given the judgment now appealed from.

All valid charges framed under articles 1 and 36 of the Constitution against promoting the dissolution of the society and pronouncing an insult in the assembly must in substance be the same, therefore, the judgment of May 17, 1881, which remains in full force and effect, does not prevent the society from framing charges under these provisions of the organic law, and prosecuting the appellee thereon, but only restrains it from making the same alleged acts of violation a pretext for his expulsion. So far as the acts constituting the offenses for which he was first expelled are concerned the rights of the parties under that judgment are res adjudicata. But while that decree is a complete protection to the appellee from further interference with his rights of membership on account of the alleged offenses for which he was first expelled, he is still amenable to the corporation, as other members, for any other act committed in violation of its charter, constitution or by-laws.

The judgment is affirmed.

Kohn & Barker and W. Lindsay for appellant.

Brown & Davie for appellee.

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## LAIDLEY & CO. v. CUMMINS.

(Filed December 19, 1883.)

**Bankruptcy—Discharge—Pleading—Jurisdiction—United States Revised Statutes, section 5119, which provides that a discharge in bankruptcy may**

**be pleaded by simply setting forth in terms the certificate of discharge, with the day on which it was granted, is in derogation of the common law requiring jurisdictional facts to be pleaded, and, therefore, should be strictly followed. If the certificate is not set forth in terms then facts showing that the court had jurisdiction of the subject-matter of the person of the defendant must be pleaded. A discharge under the act of 1867 can be attacked in a court on the ground that the court granting it had no jurisdiction of the person of the defendant.**

Appeal from Kenton Circuit Court.

Opinion of the court by Presiding Judge Reid.

This was an action in the Kenton Circuit Court on a promissory note. The appellee answered relying on a discharge in bankruptcy granted by the District Court of the United States for the Eastern District of Missouri. A demurrer to the answer was overruled, and a reply was filed alleging that appellee had neither resided nor done business in the Eastern District of Missouri for six months preceding the filing of his petition in bankruptcy in the United States Court for that district, nor for any part thereof; that at the time of filing said petition, and for more than six months prior thereto, he had resided in Kentucky and done business in Cincinnati, O., and that all the proceedings in the U. S. District Court for said Eastern District were null and void—in other words, that the court had no jurisdiction to grant the discharge. To the reply a demurrer was sustained, and appellants declining to plead further the petition was dismissed.

The first question raised is as to the sufficiency of the answer. Section 5119, Revised Statutes of the United States, provides: "A discharge in bankruptcy duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands, which were, or might have been, proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of it forth in its terms, as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands." (In the original act it was provided that the discharge should "be set forth in hæc verba.") "The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge." This is a statutory provision for pleading a certificate of discharge that has

been duly granted, and when properly pleaded operates a bar to such debts as are specified, and is "conclusive evidence of the fact and regularity of such discharge."

It is in violation of the common law rule which requires the facts showing the jurisdiction to be alleged, and if it is to be held as controlling the form of such plea in the State courts, as well as in the Federal courts, its form should be strictly followed. Filing the certificate of discharge with the plea, and referring to and making it part thereof, does not meet the requirement of the statute. It might perhaps be met by stating the substance of the discharge. A copy of the discharge should be set out in the plea. (Stoll v. Wilson, 38 N. J., 198.)

In Thurmond v. Andrews and Wife, 10 Bush, 400, the plea alleged that the discharge was duly granted, and it was set forth in hæc verba in the body of the plea, and it was incidentally held to be properly pleaded. Here it is not alleged that the discharge was duly granted, even if it be true that the statutory form supersedes the mode of pleading sanctioned by the State courts and dispenses with the necessity of stating the facts conferring the jurisdiction, nor is the substance of the discharge set forth.

But the sufficiency of the plea was not involved directly in the decision in the case of Thurmond v. Andrews and Wife, supra, and in our opinion the rule of pleading the discharge—which in effect is a judgment not of our courts of local jurisdiction—should be determined by the mode of pleading or proceedings in the State courts. But for section 122, Civil Code, which says that "in pleading a judgment or determination of a court or officer it is not necessary to state the facts conferring jurisdiction, but it shall be sufficient to state that the judgment or determination was duly made or given." In pleading judgments of our own courts of special jurisdiction it would be necessary to state the facts conferring the jurisdiction. The record of a foreign judgment, however, will not prove that the court rendering it had jurisdiction of the subject-matter, whatever it might prove as to the jurisdiction of the person of the defendant. The plea should allege in some form facts which show that the court granting the discharge had jurisdiction

both of the subject-matter and the person of the defendant. (Gebhard v. Garnier, 12 Bush, 321.)

The second question presented is whether a discharge under the bankrupt act of 1867, granted by a bankrupt court, when properly pleaded in bar to a suit in a State court, on a debt provable under the bankrupt law and of a nature to be barred by a valid discharge, can be assailed on the ground that the bankrupt court had no jurisdiction to grant it. Appellants concede that a discharge duly granted under the provisions of the bankrupt law can not be collaterally attacked on the ground that it was obtained by any species of fraud, and that it can only be annulled by a direct proceeding in the court that granted it, within the time fixed by the act, but urge it can be collaterally assailed for want of jurisdiction in the court granting it; while appellee maintains that it can not be attacked for any cause in any forum except in that granting it, and contends that the adjudication itself is a conclusive finding of all the facts necessary to support it.

In the absence of any decisions on this question under the bankrupt act of 1867 we think it receives an easy solution under section 5014, Revised Statutes of the United States, which reads thus: "If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of $300, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition or for the longest period during such six months, setting forth his place of residence, his inability to pay his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory and valuation in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt."

It will be seen from this section, as well as from the prescribed form of the petition in cases of voluntary bankruptcy, that it is not necessary to allege in the petition facts conferring jurisdiction on the court in which it is filed. The simple re-

quirement of the allegation of residence is not to confer jurisdiction, but seems to be solely for purposes of identity. If the law demanded that the jurisdictional facts should be averred, it might then be a serious question whether the adjudication was not conclusive on the matter of jurisdiction as it undoubtedly is on the questions that the debtor is insolvent, desires to take the benefit of the act and that he owes $300; but inasmuch as the law does not demand that the petition shall aver the facts necessary to give jurisdiction of the person of the bankrupt and the subject-matter of the proceeding, the adjudication is not conclusive evidence of such jurisdiction; and the want of it in the court giving the discharge may be shown like any other fact by plea and proof by any person in any court where the discharge may be pleaded.

Wherefore, the judgment is reversed and cause remanded, with directions to sustain the demurrer to the answer and to overrule the demurrer to the reply and for further proceedings consistent with this opinion.

W. H. McKoy for appellant.

Cleary, Hamilton & Cleary for appellee.

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## SEPARATE ESTATE.

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In reference to the case of Duke's Heirs v. Duke's Devisees, it is to be understood that the opinion delivered by the Court of Appeals, on October 17, 1882, and published 4 Ky. Law Rep., 293, was subsequently withdrawn and a rehearing granted, after which the opinions published, ante, 352. were substituted. In the substituted opinions the court is equally divided. Judge Pryor, with whom Judge Lewis concurs, affirms the opinion of the lower court, and holds that where land is conveyed to A for life, and then to his children, with remainder to his wife as her separate estate, although the wife takes an estate in futuro only, yet the limitation to her separate use becomes operative at once, and, therefore, she can not, during the life of her husband (who owns the particular estate) or during her widowhood, or any subsequent marriage, dispose of her interest except in the manner allowed by statute, which, under the Revised Statutes, is by will and not

by deed. But Judge Hines, Judge Hargis concurring, holds that the limitation to her separate use does not become operative until the death of her present husband and her subsequent marriage; because the present husband owns the life estate and has control over the land, which is inconsistent with the essential idea of separate estate, that of excluding the husband; and during widowhood the limitation to separate use can not be operative as no conjugal tie exists, therefore, during the life of her husband or her widowhood, she may alienate her interest as general estate, i. e., by deed.

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## PEREMPTORY INSTRUCTIONS.

The following criticism of the opinion of Judge Simrall in the Buford case has been handed us.

"In the interesting case of Buford v. L. & N. R. R. Co. (ante, 503) Judge Simrall holds that it is the duty of a trial court to peremptorily instruct the jury for the defendant if, upon the pleadings and evidence, a verdict in favor of the plaintiff would certainly be set aside. This opinion is supported by a decision of the U. S. Supreme Court, but is directly contrary to the decision of Court of Appeals in United Society v. Underwood, 11 Bush, 276. We are convinced that the Court of Appeals decision was right. The plaintiff is entitled to a trial by jury of every material issue of fact. The court has power to give judgment for the defendant on the pleadings or to peremptorily instruct the jury to find for the defendant on an issue of fact as to which the evidence is all in favor of the defendant simply because in both cases the matter decided is matter of law only. But a court can never usurp the jury's province of balancing the evidence offered by the parties, and deciding the issue of fact to which such evidence is addressed. It has the power to veto the decision of the jury by setting aside its verdict if it be flagrantly contrary to the weight of testimony. But this is a very different thing from the courts rendering a verdict through the form of a peremptory instruction. That it may do this under Judge Simrall's decision is manifest. A judge, notwithstanding a conflict of testimony addressed to a material issue of fact, which he confessedly has

no power to decide, can, if, in his opinion, the defendant's case is manifestly strongest, practically take away from the jury the power to decide the issue by simply giving a peremptory instruction. The inevitable result will be that where a judge from prejudice or corruption wishes to decide facts as well as law, he has only to make up his mind that the weight of testimony is so clearly one way that he would set aside a verdict looking the other, and then to peremptorily instruct the jury to return a verdict for the side he wishes to prevail."

The decision of Judge Simrall in the Buford case is supported not by one only, but by numerous decisions of the U. S. Supreme Court, and that court in turn by the recent English cases which have abandoned the old rule that where there was a scintilla of evidence offered by the defendant the case must be left to the jury, and have adopted a more enlightened one, which protects parties from the injustice and absurdities of juries while it allows them all of the substantial benefits of that mode of trial.

The modern doctrine rests upon the idea that before a case is given to the jury the court has a preliminary duty to perform, which is to determine whether the record presents any question of fact requiring the action of a jury, for if it is plain that it does not, if the judge is convinced that he should set aside any finding except for one party, say the defendant, it is idle, and worse than idle, to allow the jury to take the case, as the only effect of submitting it to them would be to give them a chance of finding in accordance with their prejudices for or against one of the parties. If the judge is clear that the evidence is all one way, then he is given the control of the question (by means of his right to set aside a contrary verdict), and it can not be claimed that there is any virtue in allowing the jury to go through the form of a finding which will be disregarded immediately afterwards, but, on the other hand, it must be admitted that there is great annoyance and expense both to the parties and the Commonwealth, besides great discredit to the jury system itself, caused by the jury finding verdicts under the influence of their feelings which have to be set aside and new trials ordered. But it is objected that while the judge is

given the power to set aside a verdict that is a mere veto on the jury, and is, therefore, different from the right to give a peremptory instruction. The difference is in name only. There is no value in the right to find a verdict which does not determine the question at issue and which is to be set aside as soon as found, except certain considerations of importance only to counsel (such as the hope of strengthening proof or of forcing a compromise), with which the court has nothing to do, therefore, we say the court's power is not really greater when it grants a peremptory instruction than when it waits to set aside the verdict after trial. The truth of the matter is that when you once concede the right of the court to weigh the verdict against the evidence, and to set aside the former if the latter is insufficient, you admit all that is necessary, for thereby the right of the judge to set up his own judgment against the jury's and to control their verdict is fully established, and the only question is when that control shall be exercised with the judgment greatly in favor of exercising it by a peremptory instruction by which costs and further delay are saved and an end put to litigation. As to the honesty of the judge, that is as much taken for granted in allowing him to set aside the verdict as it would be in giving him power to peremptorily instruct the jury in the first instance.

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## THE WORK OF THE TWO APPELLATE COURTS FOR THE YEAR 1883.

From the pages of the Kentucky Law Reporter and Journal, from January to December, 1883, a very correct account can be had of the work of our appellate courts for the year last past. The number of cases decided by the Court of Appeals in that time is 376. The total number decided by the Superior Court is 380; of those decided in the Court of Appeals Chief Justice Hargis is to be credited with 103; Judge Pryor with 179; Judge Hines with 45, and Judge Lewis with 49. Of those decided in the Superior Court Judge Bowden is to be credited with 100; Judge Reid with 147; Judge Richards with 132. In the remaining case each judge wrote an opinion, Judge Bow-

den laying down two propositions to neither of which Judge Reid could agree, and Judge Reid laying down two propositions to neither of which Judge Bowden could agree, and Judge Richards holding out the right of fellowship to one and the left hand of fellowship to the other, but all saying that the lower court had erred.

In the Court of Appeals out of 44 criminal cases decided, 28 were affirmed, and 16 reversed; out of 324 civil cases decided, 195 were affirmed and 129 reversed. The other 8 were dismissed.

In the Superior Court there were 26 criminal cases decided, half affirmed and half reversed; of civil cases 162 were affirmed and 150 reversed. Twenty-one cases were dismissed.

So that the Court of Appeals seems to coincide with the lower court in say three cases out of five, while the Superior Court finds the circuit judge right in say 52 cases out of 100, or in a few more than half.

The following is the record of the individual judges:

In the Court of Appeals, C. J. Hargis affirmed 14, and reversed 9 criminal cases; affirmed 36 and reversed 32 civil cases, and dismissed 2 cases.

Judge Pryor affirmed 7 criminal cases and reversed none; affirmed 95 civil cases and reversed 72, dismissed 5.

Judge Hines affirmed 4 criminal cases and reversed none; affirmed 33 civil cases and reversed 8. Judge Lewis affirmed 3 criminal cases, reversed 7; affirmed 21 civil cases, reversed 17, dismissed 1.

In the Superior Court, Presiding Judge Bowden affirmed 3 criminal cases, reversed 5; affirmed 44 civil cases, reversed 40, dismissed 8. Judge Reid affirmed 6 criminal cases, reversed 5; affirmed 70 civil cases, reversed 61, dismissed 5. Judge Richards affirmed 4 criminal cases, reversed 3; affirmed 58 civil cases, reversed 59, dismissed 8.

In making these tables, where several cases were decided together, they have been counted as one case. H.

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full—Alphabetically arranged according to their subject-matters.**

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Acknowledgment—

Insufficient certificate of wife's, of deed. See Jefferson County, &c. v. Heil, ante, 539.

Adverse Possession—

The chancellor will not require those holding the legal title to land to surrender it to one whose only claim of title is an adverse possession, although he might be entitled by reason thereof to retain the possession in his own right. Phillips v. Carroll, &c. January 17, 1884. Owen Cir. Ct. Opin. by Pryor, J., Ct. of Ap., rev. Hallam & Gordon for appellant; Evan E. Settle for appellees.

Appeals—See Wills, 5—

1. Transfer—Jurisdiction—The Superior Court is authorized to transfer appeals to the Court of Appeals only when that court has jurisdiction, and when neither court has jurisdiction the appeal will be dismissed. Although this appeal involves the validity of a statute, yet as the judgment was for the defendant in a case in which the fine could not have exceeded $50, neither court has jurisdiction, and the appeal is dismissed. Commonwealth v. Fisher. January 30, 1884. Daviess Cir. Ct. Opin. by Bowden, P. J., Sup. Ct., dis. Joe Noe for appellant.
2. Instructions—Instructions can not be considered unless made a part of the record by an order of court or by a bill of exceptions, and this rule applies as well to criminal prosecutions as to civil actions. Although the order of court in this case shows that certain instructions were given and refused, yet as there is nothing to identify those copied as the ones given and refused, except the statement of the clerk, they can not be considered. Commonwealth v. Clark. January 30, 1884. Ballard Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. C. H. Thomas for appellant; White & Reeves for appellee.
3. Dismissal—The court will not hear a motion to dismiss an appeal under section 757 of the Code, in the absence of notice, without the appellant's consent, before the day the case is set for trial on the docket. Empire Coal and Mining Co. v. McIntosh. January 15, 1884. Christian Cir. Ct. Opin. by Hargis, Ch. J., Ct. of Ap. John W. McPherson and Campbell & Galbraith for appellant; J. I. Landes and Petree & Littell for appellee.

4. Notice—Dismissal—The court will not hear a motion to dismiss an appeal under submission in the absence of notice. Kemper, &c. v. Kemper, &c. January 15, 1884. Owen Cir. Ct. Opin. by Hargis, Ch. J., Ct. of Ap. O. B. Hallam for appellants; J. H. Dorman and E. E. Settle for appellees.

5. Assignment of errors—In an action in equity, where there is a single issue involved, an assignment as error that the court erred in rendering the judgment or dismissing the petition brings before the court for review all the pleadings and evidence in the case. Thomasson, &c. v. Callahan, &c. January 18, 1884. Lou. Ch. Ct. Resp. by Reid, P. J., Sup. Ct., to pet. for reh'g. Lane & Harrison for appellants; Geo. C. Drane for appellees.

6. Satisfaction of judgment—The voluntary satisfaction of a judgment by the defendant does not bar the plaintiff's right to prosecute an appeal therefrom. Wells, &c. v. Weaver, &c. January 9, 1884. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., overruling mo. to dis. G. G. Gilbert for appellants; J. S. Morris for appellees.

7. Plea—Facts relied on as a bar to an appeal which do not appear from the record should be pleaded by verified answer. City of Newport v. Woods, &c. January 16, 1884. Campbell Ch. Ct. Opin. by Richards, J., overruling motion to dismiss. Chas. J. Helm for appellant; E. W. Hawkins for appellees.

8. Jurisdiction—The Superior Court has no jurisdiction of an appeal granted to the Court of Appeals, and such an appeal is stricken from the docket. Commonwealth v. Robinson. January 16, 1884. Campbell Ch. Ct. Opin. by Richards, J., Sup. Ct., striking from docket. P. W. Hardin for appellant.

9. Misdemeanor—An appeal can not be prosecuted in a misdemeanor case unless prayed and granted as prescribed in section 348 of the Criminal Code. Gallegher v. Commonwealth. January 30, 1884. Laurel Cir. Ct. Opin. by Reid, P. J., Sup. Ct., dis. Geo. Denny for appellant; H. C. Eversole for appellee.

10. Instructions—An order of court referring to certain instructions as given and refused, without directing that they shall be taken as part of the record, does not authorize the court to consider them on appeal. Buckner, &c. v. Fleming, &c. January 30, 1884. Livingston Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. D. Green for appellants; C. Bennett for appellees.

11. Amount—Jurisdiction—The "value in controversy," which determines the jurisdiction of the appeal, is the amount of the judgment against the appellant, whether the plaintiff or defendant appeals. If the defendant appeals, it is the amount ordered to be recovered from him; if the plaintiff appeals, it is so much of the amount sued for as he failed to recover.

As the appellant in this case complains that the judgment against him is for only $61.81 too much, the appeal is dismissed. Loagn v. Davis, &c. January 30, 1884. Lou. Ch. Ct. Resp. by Richards, J., Sup. Ct., to pet. for reh'g. J. R. Green and Geo. C. Drane for appellant; Emmett Field for appellees.

12. Rejected pleading—The sufficiency of a pleading offered, but not permitted to be filed, can not be considered on appeal unless made part of the record by bill of exceptions or otherwise. Fisher v. Perkins. January 11, 1884. Daviess Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Geo. W. Jolly for appellant; Weir, Weir & Walker for appellee.

13. Limitation—Where the limitation prescribed by section 745 of the Code is relied upon as a bar to an appeal it is proper to plead it by verified answer. Allen, &c. v. Marchand, &c. January 23, 1884. Taylor Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. W. B. Harrison for appellants; Rountree & Lisle for appellees.
14. Docketing by agreement—An appeal will not be docketed by agreement, the record not having been filed in time, unless it be made to appear to the court that the appeal involves some question the determination of which concerns the general public or is a matter of general public interest, or unless for good cause shown by the parties. Kentucky, &c., Mut. Ins. Co. v. Harrison. January 11, 1884. Lou. Ch. Ct. Opin. by Reid, P. J., Sup. Ct., overruling motion to docket. James Speed, Thomas and John Speed for appellant; Randolph H. Blain for appellee.
15. Assignment of errors—When the clerk has granted an appeal he has no power to docket the case until the assignment of errors is filed, and no assignment of errors having been filed in this case it is stricken from the docket. Ratcliff v. Farnnin. January 11, 1884. Elliott Cir. Ct. Opin. by Reid, P. J., Sup. Ct., striking from docket. J. R. Botts for appellant: J. W. & J. B. Hanna for appellee.
16. Partial record—As the ground upon which the appellants seek to recover land in this case in the judgment under which their interests were sold is void, and only portions of the records in which that judgment was rendered are before the court, and not such portions as enable the court to determine the validity of that judgment, the judgment of the lower court denying the relief sought is affirmed. Pryor's Heirs v. Leslie. January 26, 1884. Meade Cir. Ct. Opin. by Lewis, J., Ct. of Ap., aff. C. C. Fairleigh for appellant.
17. When the original instructions may be demanded on appeal. See Meaux v. Meaux, ante, 548.
18. After ordering transfer of appeal to Superior Court the Court of Appeals can make no further order in the case. Gay v. Hanks, ante, 578.

Assignment—See Bills and Notes, 1, 2.

Assignment of Errors—See Appeals, 5, 15—

As to particularity in making out. See Meaux v. Meaux, ante, 548.

Attachment—

1. Waiver of lien—An attaching creditor waived his lien by allowing the creditor to take charge of the attached property under an agreement to pay the creditor so much per year, the agreement providing that if any other creditor should undertake to subject the property to his debts, or if the debtor should fail to make any quarterly payment, the agreement was to end and the property was to revert to and vest in the attaching creditor, such an arrangement being fraudulent as to other creditors. Morton & Co. v. Allen, &c. January 16, 1884. Lou. Ch. Ct. Opin. by Reid, P. J., Sup. Ct., rev. A. C. Rucker for appellants; Geo. B. Eastin for appellees.
2. Sale of land—The sale of land under an attachment which had not been levied on the land, and where there had been only a service of the order of attachment upon the garnishee, was authorized, and passed no title to the purchaser. Robson & Co. v. Shea. January 24, 1884. Campbell Cir. Ct. Opin. by Pryor, J., Ct. of Ap., rev. John S. Ducker for appellants; J. R. Hallam and A. Duvall for appellee.

Bankruptcy—

1. As to limitation on actions by the assignee. See Clark, &c. v. Trout, ante, 555.
2. As to pleading discharge in. See Laidly, &c. v. Cummings, ante, 590.
3. Discharge—The discharge in bankruptcy of a member of one firm on the petition of the firm does not release him from liability on debts due by him as a member of another firm. Fisher v. Perkins. January 11, 1884. Daviess Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Geo. W. Jolly for appellant; Weir, Weir & Walker for appellee.

Bill of Exceptions—

Time of filing. See L. & N. R. R. Co. v. Turner, ante, 542; Meaux v. Meaux, ante, 548.

Bills and Notes—See Contracts—

1. Bill of exchange—A creditor may, by writing or by parol, assign a part of the debt so as to enable the assignee to recover it by force of that assignment and independent of the debtor's consent, but a negotiable bill for a part of the fund is not an assignment before acceptance. To constitute an equitable assignment of part of a debt it is necessary that the order should be drawn, not generally, but upon the particular fund a part of which is to be assigned.
2. A bill of exchange can not be converted into an order drawn on a particular friend for a part of it by evidence that such was the intention of both drawer and payee. Hart's Ass'ee v. Dixon. October 17, 1883. Henderson Cir. Ct. Opin. by Bowden, P. J., aff. H. F. Turner for appellant; S. B. & R. D. Vance for appellee.

Common Schools—

1. Trustees—Employment of teachers—An election having been held in a certain school district for the purpose of electing two trustees in room of two whose terms had expired, one of the two trustees elected declined to qualify. The other took the required oath and enclosed the evidence of his qualification to the school commissioner, who, failing to receive the letter, appointed two trustees in place of the two who had been elected, and they employed the appellant to teach the common school. At the time of their appointment appellee was already teaching the school under the employment of two of the former trustees and the newly-elected trustee who had qualified. There being an old schoolhouse and a new, the appellee taught in the old and the appellant in the new house.

   Held—That appellee is entitled to the school money, as those employing him were the trustees, and it is immaterial whether he taught in one schoolhouse or the other.
2. School trustees have the right to act until their successors are chosen and qualified. Cravens v. Purns, By, &c. January 17, 1884. Marion Cir. Ct. Opin. by Pryor, J., Ct. of Ap., aff.

Construction of Deeds—See Bullock, &c. v. Caldwell, ante, 576.

Construction of Statutes—

Statute not retrospective unless plainly intended to be so. Lou. Water Co. v. Hamilton, ante, 557.

Contracts—

1. Consideration—Every written promise imports a consideration. and the burden is on the party attacking it. Snowden v. Light. January 14, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., rev. N. T. Crutchfield for appellant; Goodloe & Humphrey for appellee.
2. Acceptance of part payment—Acceptance by a creditor of a part of his debt, or the promise of the debtor to pay part in satisfaction of the whole, is not binding upon the creditor unless in some way beneficial to him, the benefit constituting the consideration.
3. Negotiable note—It is only when a note is made negotiable and payable at a bank that it can be placed on the footing of a bill of exchange, and then, in order that it may be so placed, it must be actually discounted by the bank. Merely designating a bank as the place of payment of a note gives it neither actually nor potentially the character of a bill. Newman v. Evans, &c. January 14, 1884. Boyd Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Hampton & Hager for appellant; S. S. Savage and L. T. Moore for appellees.
4. New promise—Consideration—A debtor, subsequent to his discharge in bankruptcy, entered into an agreement with his surety, whose demand was extinguished by the discharge and who was threatening to foreclose a mortgage executed by the bankrupt to indemnify him, whereby the surety agreed to and did pay the debts for which he was bound, and agreed to forbear, and did forbear, for one year to sue and foreclose the mortgage executed to indemnify him, by which the bankrupt "was enabled to and did retain possession of the mortgaged property for at least one year longer than he otherwise would have done."

   Held—That the forbearance to foreclose the mortgage was a sufficient consideration to uphold a promise by the bankrupt, the mortgagor, to refund the money thus paid by the surety. Stapp, &c. v. Thomas. January 30, 1884. Henderson Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Yeaman & Lockett for appellants; H. F. Turner for appellee.
5. Compromise—Preference—The property and franchises of an insolvent corporation were sold under decree, and the purchase was declared to inure to the benefit of the corporation, which was held to be entitled to be restored to the possession of the property upon the payment to the purchasers of what they had paid therefor. The corporation, being unable to comply with the mandate, entered into a contract of compromise with the purchasers, who had formed themselves into a new company, agreeing to allow them the benefit of their purchase, the new company to issue certificates of its stock to the holders of bonds in the old company, and also a certain amount of stock to the stockholders in the old corporation. This compromise was accepted by all the stockholders except two, the appellees, who prosecuted actions upon their bonds, recovered judgment against the old company and had return of "no property." They thereupon brought this action against the president of the old company and the new company, seeking to make them liable for issuing stock to the stockholders of the old corporation without seeing that all the debts of the old corporation were first paid. Sub-

sequent to the bringing of the action the certificates of stock in the new company issued in the name of this appellee, and which were deposited in a bank upon the refusal of appellees to accept them, were sold and the proceeds of sale applied as credits upon their judgments.

Held—That all that appellees can ask is that they be placed where they were before the compromise was made, and it appearing that they have received under the compromise more than they would have received if the agreement had not been entered into, they are without remedy even against the stockholders. Nor can they have their debts satisfied, to the exclusion of other creditors, out of what remains undisposed of in the hands of the president of the old company of a fund set apart for the payment of the costs of litigations which might arise, etc. All the creditors of the old company have the right to share in the distribution of this fund.

Second—A debtor has no power to dispose of his estate in fraud of his creditors, or to compromise with a part of his creditors and hold those who are unwilling to compromise bound by its terms. He may, however, when done in good faith, secure a part of his creditors to the exclusion of others, and there is no remedy except for constructive fraud, when done in contemplation of insolvency or with a design to prefer. Zim's Adm'r v. Lawrence's Ex'ors. Same v. Shinkle. Lawrence's Ex'ors v. Ky. Cent. R. R. Co. Shinkle v. Same. Jan. 26, 1884. Kenton Ch. Ct. Opin. by Pryor, J., Ct., Ap., rev. first two and aff. last two cases. J. F. & C. H. Fisk and W. M. Ramsey for Zim's Adm'r; W. H. Mackoy for Lawrence's Ex'ors and Shinkle; O'Hara & Bryan for Ky. Cent. R. R. Co.

Conveyances—

1. Reformation—This being an action in equity to reform a conveyance so as to have inserted a reservation of the family burying ground, alleged to have been omitted by mistake or oversight, the chancellor acted properly in refusing the relief sought in the absence of any proof showing a mistake in the execution of the conveyance. Even in the absence of any reservation the grantee acquires no right to the bodies of the dead by reason of his purchase, nor the right to remove the soil over them, nor to mutilate or otherwise destroy the graves. Barlow, &c. v. Hudson. January 31, 1884. Garrard Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. O. Bradley for appellants; Denny & Tomlinson for appellee.
2. Deed must be accepted by grantee—effect of recording. Jeff. Co., &c. v. Heil, ante, 539.

Corporations—See Injunction—

1. Power of—Corporations organized under General Statutes, chapter 38, stand upon the same footing as corporations created by direct legislation.
2. The power "to make contracts and transfer property," conferred by section 2 of chapter 58 upon every such corporation, does not confer an authority to make contracts, and to acquire and transfer property in a business other than that which the corporation is created to conduct, but is incidental as a means of exercising the authority to carry on that business.
3. A corporation organized under the general law for "the manufacturing and vending of stoves, tinware and iron and tin work generally," can not go into market and buy promissory notes and stock in other corporations, and enforce an executory contract for their sale.

4. Where a corporation has entered into a contract which it had no power to make the contract may be avoided by either party so long as it remains wholly unexecuted. Lithgow Man. Co. v. Fitch. January 14, 1884. Jeff. Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. Brown & Davie for appellant; Barnett, Noble & Barnett and A. P. Humphrey for appellee.
5. Liability for expulsion of member. See Society, &c. v. Montedonico, ante, 586.

County Levy—

Appeal—An appeal does not lie to the circuit court from the refusal of the county court to make a levy to discharge a claim already allowed. McKee v. Washington Co. Ct. January 30, 1884. Washington Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Geo. R. McKee and A. Duvall for appellant; J. W. S. Clement for appellee.

Criminal Law—See Pleading and Practice in Criminal Cases—

1. Salesman not a merchant—A mere salesman can not be indicted as a merchant selling liquor without license, and this appellant, indicted as such, should have been permitted to show that the witness against him was the merchant owning the grocery, and that he was merely an employe attending to the business for him. Carrico v. Commonwealth. January 23, 1884. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Weir, Weir & Walker or appellant; Joe Noe or appellee.
2. Embezzlement—The failure of an agent to pay over to his principal money received on accounts entrusted to him for collection is not punishable as embezzlement under section 2, article 12, chapter 29, General Statutes. Commonwealth v. Bull. January 15, 1884. Kenton Crim. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. P. W. Hardin for appellant.
3. Sale of liquor by druggist—A druggist is a "merchant," and is indictable as such for selling spirituous liquors without a license in the absence of a physician's prescription. Commonwealth v. Grorty. January 30, 1884. Boyle Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. R. C. Warren for appellant.

Evidence—

Transactions with decedent—A party can not establish by his own testimony a parol gift of land from one who is dead. Phillips v. Carroll, &c. January 17, 1884. Owen Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Hallam & Gordon for appellant; Evan E. Settle for appellees.

Execution Sale—

Crying of bids by sheriff—Where a purchaser is present at an execution sale and makes his bids, the crying of the bid by the sheriff, as authorized, is neither a violation of the letter nor spirit of the statute which provides that no officer shall directly or indirectly bid for, or buy, any property which may be sold by him under execution. Mullins, &c. v. Buskirk, &c. January 19, 1884. Grant Cir. Ct. Opin. by Pryor, J. Ct. Ap., rev. Collins & Fenley for appellants; Geo. C. Drane and E. H. Smith for appellees.

Fraudulent Conveyance—

1. A deed to the wife of land paid for by the husband with money received by him in the right of the wife, under an agreement to make this

investment, is held not to be fraudulent as to the husband's creditors. Delker v. Craig, &c. January 12, 1884. Daviess Cir. Ct. Opin. by Pryor, J., Ct. of Ap., aff. Weir, Weir & Walker for appellant; Owen & Ellis for appellees.

2. Consideration paid by one—Deed made to another—Where a conveyance was made to A the consideration was paid B, who took possession of the land and had retained it for fifteen years, the grantee, A, receiving no rent and making no claim against those in possession, a creditor of A purchasing with a full knowledge of the claim of the parties in possession, acquired nothing by his purchase, although B may have had the conveyance made to A for the purpose of defrauding his (B's) creditors. Maupin v. Turley, &c. January 24, 1884. Powell Cir. Ct. Opin. by Pryor, J. Ct. Ap., aff. Reid & Stone and W. H. Holt for appellant; H. C. Lilly for appellees.

3. Where part of consideration of conveyance is agreement to furnish grantor support. See Easum v. Pirtle, ante, 572.

Fraud, Statute of—

1. Right of way—Order of county court—A right of way having been granted to the appellant in consideration of his consent to the closing of a public highway in which he had a special interest, a letter from the grantor to the grantee telling him he had the right of way recorded, taken in connection with an order of the county court reciting that the old road was discontinued upon the condition that appellant was to have the passway agreed upon, describing it, was sufficient to take the agreement out of the statute of frauds.

2. Evidence—Where a writing required by the statute of frauds has been lost, its loss and contents may be proved by parol.

3. The legal title to the land being in the grantor of the right of way at the time the agreement was made, and the grantee having no notice of the purchase of the land by the grantor as guardian of his infant children, they are bound by the contract. Evans v. Miller, &c. January 17, 1884. Garrard Cir. Ct. Opin. by Hargis, C. J., Ct. of Ap., rev. Anderson & Henderson for appellant; W. O. Bradley for appellees.

Guaranty—

1. Landlord and tenant—Condition precedent—Pleading—Where there was a guaranty for the payment of rent under a lease, whereby the landlord covenanted "to keep the tenant in quiet possession of the premises during the term," this covenant was a condition precedent to the guarantor's liability, and in an action against the guarantor the petition should have alleged its performance.

2. Consideration—When the consideration between the principal and creditor has passed and become executed before the contract of the guarantor is made, and such contract was no part of the inducement to the creation of the original debt, some additional consideration is necessary to uphold the contract of guaranty.

3. Evidence—As the guaranty in this case recited that it was in consideration of the extension of time for the payment of rent, as specified in the lease, it was competent for the guarantor to show that the lease, including the provision for the extension of time for the payment of rent, was

fully executed before he became liable, and that neither his guaranty, nor the promise thereof, was any part of the inducement for such extension.

4. Landlord's lien—The landlord holds his lien for rent by operation of law and not as a trust from the parties, and can assert it by proper legal proceedings or not, as he thinks proper, without releasing the guarantor. Snowden v. Light. January 14, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., rev. N. T. Crutchfield for appellant; Goodloe & Humphrey for appellee.

Guardian and Ward—See Frauds, Statute of, 3.

Homestead—

1. Release—Waiver—The release of a homestead exemption to be sold under execution was not valid, although in writing, not being signed by the wife of the debtor, nor "acknowledged and recorded in the same manner as conveyances of real estate;" nor was the written contract of the debtor to pay rent for the homestead after it was sold under execution a waiver of his homestead right. Braun, &c. v. Fogle, &c. January 24, 1884. Pendleton Cir. Ct. Opin. by Lewis, J., Ct. of Ap., aff. Clark & Applegate for appellants; C. H. Lee for appellees.
2. Husband and wife—The wife is not entitled to sue for or recover any damages resulting from the sale of the husband's homestead under execution, and it was error to render a judgment in favor of the husband and wife jointly for such damages.
3. Sale under execution—The sale of land under execution "subject to the right of homestead" was unauthorized and void. If the land having once been set apart as a homestead, could nevertheless be afterward levied on, it was the duty of the sheriff to have the extent of the homestead defined anew if valuers thought it could be done; if they thought it could not be done, then he should have sold the land out and out, provided more than $1,000 was offered.
4. Damages—Lawful act—The plaintiffs allege as the cause of injury that they had sold their homestead for "the agreed price of $2,000, cash," and that the subsequent levy upon and sale of the homestead under the defendant's execution had "frustrated and broken up" the sale. Held —That if the levy and sale under the execution were valid, the defendants can not be held liable for the results of a rightful act, and, if invalid, they present no legal obstacle to the consummation of the trade, and can not be regarded as the cause of its breaking off, it not being claimed that the defendants acted otherwise than in good faith. Buckner, &c. v. Fleming, &c. January 30, 1884. Livingston Cir. Ct. Opin. by Bowden, J., Sup., Ct., rev. W. D. Green for appellants; C. Bennett for appellees.
5. Right of widow to. See L. & N. R. R. Co. v. Connelly, ante, 579.
6. Right of children to. See Elmore v. Elmore's Adm'r, ante, 580.

Indictment—See Pleading and Practice in Criminal Cases.

Injunction—

Against corporation to prevent expulsion of member. See Society, &c. v. Montedonico, ante, 587.

Instructions—See Appeals, 2, 10, 18.

Jurisdiction—

Service of process—Actual notice of the commencement of the action is not sufficient to give the court jurisdiction of the person of the defendant unless given as the law prescribes, which requires the clerk to sign the summons and to make a copy of it as signed, which must be delivered to the defendant by a person authorized. Cornelison v. Curd. January 11, 1884. Madison Ct. Com. Pleas. Opin. by Bowden, J., rev. Bennett & Smith and Tyler & Hazelrigg for appellant.

Lien—

On bank stock. See Woolley v. Louisville Bk. Co., ante., 562.

Limitation—See Appeal, 13—

1. Pleading—The statement in an answer that the defendant "pleads and relies upon the statute of limitation as a bar to plaintiff's action," without setting forth any facts to enable the court to determine, from the pleading, whether a statutory bar does or not exist, is not a sufficient plea of the statute of limitation. Woodward, &c. v. Enders' Ex'or. January 22, 1884. McCracken Ct. Com. Pleas. Opin. by Lewis, J., Ct. Ap., aff. L. D. Husbands for appellants; C. S. Marshall for appellee.
2. As to trusts. See Helm's Ex'or v. Rogers, ante, 569.
3. On action attacking voluntary conveyance. See Easum v. Pirtle, ante, 572.
4. Set-off—Pleading—Limitation ceases to run against a set-off at the commencement of the original action, and, therefore, a plea of limitation against a set-off should allege that the prescribed period of limitation had run before the filing of the plaintiff's petition. Turner v. Everett. January 30, 1884. Montgomery Cir. Ct. Opin. by Richards, J., Sup. Ct., granting reh'g and rev. Thos. Turner for appellant; Reid & Stone for appellee.

Local Option—

1. Indictmnet—An indictment under the act commonly known as the "local option" law should allege facts showing that the act was in force at the time of the sale in the particular district or town where the selling is alleged to have occurred. The allegation, "and the vote of said district having been compared and certified to the county court and recorded as required by law," does not show that the examining board compared the vote and made the certificate as required by section 5 of the act. Leforce v. Commonwealth. McClarty v. Commonwealth. January 23, 1884. Whitley Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. C. W. Lester for appellants; P. W. Hardin for appellee.
2. Instructions—Upon the trial of appellant, a distiller, under an indictment against him for a violation of the "local option" law, it was error to instruct the jury that they might convict if they believed that the defendant sold any liquor to the person named in the indictment without excepting a sale in good faith by wholesale, and a second instruction not purporting to modify the first, although in conflict with it, did not cure the defect.
3. Wholesale transaction—To constitute a wholesale transaction within the meaning of the statute it is not necessary that the quantity sold should be as much as five gallons, nor that the purchaser should buy to resell. What constitutes a wholesale dealer, and what constitutes a wholesale

transaction, if made by a wholesale dealer, are questions of fact, to be proved by evidence and found by the jury. It is "the usual course of trade" which determines the answers.

4. When the sale is made with the intention to furnish the purchaser indirectly, under the guise of a wholesale transaction, with whisky to be consumed by him in drinking, the seller violates the local option law; but the seller may furnish whisky to the purchaser to be "consumed" by him in some other way than in drinking without violating the law. Pence v. Commonwealth. January 18, 1884. Madison Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. C. F. & A. R. Burnam for appellant; C. H. Bronston for appellee.

Lis Pendens—See Notice, 1.

Misrepresentation—See Woolley v. Lou. Bk. Co., ante 562.

Mortgages—

Property left with mortgagee—Damages for injury—A mortgagor can not maintain an action at law to recover damages from the mortgagee because, after condition broken, the mortgagee takes the mortgaged property into his possession. If the debt has been paid, or if the mortgagor desires to call the mortgagee to account, to have the mortgaged property sold and the surplus ascertained, he can do so, but he can not recover damages. The remedy in equity is full and complete. Fleener v. Jones' Adm'r. January 30, 1884. Butler Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Wm. Wand for appellant; John L. Scott for appellee.

New Trial—

Sufficiency of grounds for. See Meaux v. Meaux, ante, 548.

Notice—See Frauds, Statute of, 3—

1. The grantee of a right of way was not bound to take notice of a suit in a county in which the land was not situated.
2. Constructive notice—A record to uphold constructive notice must describe the land with such reasonable certainty as would inform a prudent person of its location. Evans v. Miller, &c. January 17, 1884. Garrard Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. Anderson & Hendron for appellant; W. O. Bradley for appellees.

Pleading in Civil Cases—See Bankruptcy, 1, 2; Guaranty, 1; Limitation, 1; Process—

1. Descent—A child having inherited certain real estate from her mother, and died, the maternal aunts and uncles of the child, suing as her heirs at law to recover this estate, should have alleged the death of both the maternal grandparents of the child, as only in that event are the uncles and aunts entitled to the land. An allegation that the plaintiffs are the heirs at law of the decedent is not sufficient, being a mere conclusion of law. Berkley, &c. v. Stewart &c. January 29, 1884. Crittenden Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. L. H. James, C. Bennett and W. Lindsay for appellants; Blue Finley for appellees.
2. Old and new Codes—The old Code regulates further proceedings in civil cases pending at the time the new Code was adopted, therefore, no reply is necessary to an answer filed in a case pending at that time.

Eversole, &c. v. Laytham. January 16, 1884. Lewis Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Cochran & Son for appellants; Geo. T. Halbert for appellee.

Pleading and Practice in Criminal Cases—

1. Exceptions—The appellant having filed grounds for a new trial, and also "moved the court to set aside the verdict of the jury and vacate the judgment," the decision of the court upon the motion to set aside the verdict of the jury and vacate the judgment is treated as separate and distinct from the decision upon the motion for a new trial, and is subject to exception.
2. Appearance—The defendant by entering a motion for a new trial, which was granted, entered his appearance to the proceeding, and upon his failure to appear at the second trial it was not erroneous to take the indictment for confessed, and call a jury to fix the punishment.
3. Indictment—As no demurrer was filed to the indictment, and there was no motion to arrest the judgment, the sufficiency of the indictment can not be inquired into. Talbott v. Commonwealth. January 21, 1884. Daviess Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Haycraft & Slack for appellant; Joe Noe and P. W. Hardin for appellee.
4. Passing counterfeit money—An indictment for passing counterfeit money should so identify the coin as to bar another prosecution and enable the accused to know with reasonable certainty what he is charged with passing, and the jury to ascertain it. The general averment that the accused paid and tendered "in payment for chestnuts," without stating to whom, "a counterfeit coin of the half dollar denomination," resembling "the coin (commonly called) half dollar of the United States of America," is not sufficient description of the coin. Commonwealth v. Fields. January 15, 1884. Boyle Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. P. W. Hardin for appellant.
5. Indictment charging the defendant with the offense of "maliciously shooting with intent to kill," charges the offense with sufficient certainty, the omission of the words "at another" after the word "shooting" being immaterial, although those words are used in the statute. Thompson v. Commonwealth. January 14, 1884. Laurel Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. W. H. Randle for appellant.
6. Computation of time—In determining whether the record in a misdemeanor case has been filed within sixty days after the judgment, as required by section 348 of the Criminal Code, the day on which the judgment was rendered must be counted.

   In this case, the motion for a new trial having been overruled September 29, the record filed November 28 was not in time. Harris v. Commonwealth. January 18, 1884. Harrison Cir. Ct. Opin. by Bowden, J., Sup. Ct., dis. P. W. Hardin for appellee.
7. Indictment for suffering gaming—An indictment for suffering gaming which charges the defendant with suffering games of chance in his house and on his premises, upon which both money and property were bet, lost and won, is sufficiently certain, and charges but a single offense.
8. Under such an indictment it is sufficient to prove either that money or that property was bet, lost and won at the games suffered, although it would not be sufficient to make the allegation in the disjunctive form.

9. The term "premises" includes houses, and, therefore, the allegation that the games were suffered in the defendant's house and on his premises amounts to no more than an allegation that they were suffered on his premises.
10. Naming the game was not essential to the validity of the indictment, and the statement in the indictment that several-named games were permitted does not render it invalid.
11. The accused can not require that the names of the persons who gambled shall be alleged. Perry v. Commonwealth. January 21, 1884. Henry Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Carroll & Barbour for appellant; J. S. Morris for appellee.
12. Witnesses—Upon the trial of an indictment for obstructing a public highway, in which it was necessary for the Commonwealth to prove several material points, the court erred in announcing at the beginning of the trial that the witnesses should be limited to four on each side, and in refusing to allow the Commonwealth to introduce more than that number. While circumstances might arise, even in a criminal case, which would authorize the court to refuse a party the privilege of introducing further testimony upon a particular point, that authority can never extend to limiting the number of witnesses at the commencement of the trial, before the exigencies of these cases are developed. Commonwealth v. Messmore. January 30, 1884. Hickman Cir. Ct. Opin. by Richards, J., Sup. Ct , rev. C. H. Thomas for appellant; Geo. W. Griffey for appellee.
13. As to sufficiency of indictment for false swearing. See Richey v. Commonwealth, ante, 543.
14. Where there was no evidence that accused acted in self-defense, instruction on that subject was improper. See Slagel v. Commonwealth, ante, 545.
15. Demurrer to indictment for charging distinct offenses. Ibid.
16. Owner of grist mill exempted not disqualified for jury service. Ibid.

Practice in Civil Cases—See Witnesses—

1. Defects cured—Burden of proof—When the petition omits an allegation necessary to the cause of action the existence of the fact omitted to be alleged will be placed in issue by an answer denying it, but the burden of proof remains precisely where it would have been had the issue been regularly formed. Snowden v. Light. January 14, 1884. Jefferson Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., rev. N. T. Crutchfield for appellant; Goodloe & Humphrey for appellee.
2. Revivor—Void judgment—As the plaintiff died pending the action, and the order of revivor was not made by consent or served as required by section 503 of the Code, the judgment subsequently rendered is void, and can not be reversed until the inferior court has refused on motion to set it aside. Carpenter v. Layton's Ex'or. January 9, 1884. Mason Cir. Ct. Opin. by Bowden, J., Sup. Ct., dis. T. C. Campbell for appellant.

Process—See Jurisdiction—

Process on amended petition—An amended petition relying upon a new promise made by the defendant after his discharge in bankruptcy, pleaded by him in his answer to the original petition, states a new cause of action, and a judgment rendered without service of process upon the

amendment is void and can not be reversed until the inferior court has refused, on motion, to set it aside. The amended petition in this case cures any defect in the answer pleading the discharge. Sweeney v. Middleton. January 9, 1884. Shelby Cir. Ct. Opin. by Reid, P. J., Sup. Ct., dis. Bullock & Beckham for appellant; Pryor J. Foree for appellee.

Res Adjudicata—

Judgment on demurrer as a bar. See Woolley v. Louisville Bk. Co., ante, 562.

Revivor—See Practice in Civil Cases, 2.

Sales—

1. Breach—Damages—Where there was a contract for the delivery of merchantable wheat, if the purchaser was to furnish sacks in which to put the wheat, and by reason of his failure to do so the seller was prevented from threshing his wheat and delivering it according to contract, and in consequence of this delay the wheat was damaged, the purchaser is liable for the damages sustained; but if such was not the contract, or the damages to the wheat resulted from constant rains upon it before it could have been delivered if the sacks had been furnished in a reasonable time, no damages can be recovered of the purchaser.
2. Acceptance of damaged goods—If the wheat delivered was damaged at the time, and so known to the purchaser, and he received it unconditionally, the seller is entitled to recover the contract price; but if the purchaser declined to pay for the wheat delivered for the reason that it was damaged, and received it as damaged wheat, the seller is entitled to recover only its market value.
3. Damages for failure to deliver—If the defendant, the purchaser, complied with his part of the contract, and the seller failed or refused to deliver the wheat, then the defendant is entitled to recover, on his counterclaim, the difference, if any, between the price to be paid and the marketable value of the wheat at the place of delivery. Thomas v. Carpenter. January 29, 1884. Mason Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. T. C. Campbell and W. Lindsay for appellant; Wadsworth & Son for appellee.
4. As to warranty upon sale of personal property. Fogg's Adm'r v. Rogers, &c., ante, 581.

Slander—

An action for slander will lie for the willful publication of any false accusation, though made in general words only, if the charge clearly and unequivocally imports that the person accused is guilty of some felony or crime of some turpitude as to render him liable, upon indictment, to some infamous punishment. A reference to the plaintiff as a "thieving" person is held in this case to be actionable. Connor v. Bransford. January 12, 1884. Monroe Cir. Ct. Opin. by Lewis, J., Ct. of Ap., rev. John M. Basham for appellee.

Taxation—See Louisville Water Co. v. Hamilton, ante, 557—

1. Collection of taxes—The act of March 6, 1876, which provides for enforcing the payment of taxes due the city of Covington by suit in the circuit court, was not designed to make the chancellor the tax gatherer of the city. It is only when the treasurer and city collector have exhausted their powers to enforce the collection of the taxes, in the manner designated in the charter, that resort can be had to the circuit court.

2. When the payment of taxes is attempted to be coerced by suit it must be made to appear that those who have the authority to impose the tax have complied, in every essential particular, with the power delegated. McDonald v. City of Covington. January 18, 1884. Kenton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. T. F. Hallam for appellant; McKee & Finnell for appellee.
3. Mode of compelling payment of taxes. See Louisville Water Co. v. Hamilton, ante, 557.

Verdict—

Special—Where either party moves for a special verdict a general verdict is unauthorized, and although a general verdict was returned in this case, the court assumed that the judgment was based on the special findings. Buckner, &c. v. Fleming, &c. January 30, 1884. Livingston Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. D. Green for appellants; C. Bennett for appellees.

Voluntary Conveyance—

Effect of agreement to support grantor. See Easum v Pirtle, ante, 572.

Warranty—See Fogg's Adm'r v. Rogers, &c., ante, 581.

Wills—

1. Practice—Trial—Upon the trial of an appeal from a judgment of the county court admitting a will to probate, the action of the court in permitting the judgment to be read to the jury, if irregular, was not prejudicial to the contestants, as it was competent for the propounders to show otherwise the fact recited by the judgment, that the will was proved by the oaths of the subscribing witnesses, which tended to discredit one of them who testified against the testator's capacity.
2. Instructions—In a contest over a will it is not necessary that the jury should be required to find, in the language of the statute, that the testator was of "sound mind." All that is necessary is that the jury should be required to find the existence of the quality or condition necessary to constitute testamentary capacity.
3. Burden of proof—It is not sufficient in order to make for the propounders a prima facie case and to shift the burden from them to the contestants to merely prove the due execution of the paper purporting to be a will. It must also appear to the jury that the paper is not irrational in its provisions, nor inconsistent in itself with the soundness of the testator's mind.
4. Instructions—It was error to instruct the jury that they should receive with great caution the testimony of an attesting witness against the testamentary capacity of the testator. It was an invasion of the province of the jury, who are the sole judges of the evidence and the credibility of the witnesses.
5. As the evidence in the case is so conclusive for the appellees that if the verdict had been for appellants the court would have been compelled to set it aside as flagrantly against the evidence, the court will not reverse for errors in instructions. Bohlsen, &c. v. Bohlsen, &c. January 19, 1884. Jefferson Ct. of Com. Pleas. Opin. by Lewis, J., Ct. Ap., aff. R. C. Davis, Mat O'Dougherty and E. E. McKay for appellants; J. L. Clemmens and E. W. Hines for appellees.

Witnesses—

Mode of contradicting. See Meaux v. Meaux, ante, 549.

## RECENT LEGAL LITERATURE.

We notice that a new life of Lord Lyndhurst has been recently published in England. It is by Sir Thomas Martin. We have not yet seen it, but we understand from mention made of it in the London papers that its chief object is to discredit the portrait of Lyndhurst drawn by Lord Campbell in the Lives of the Chancellors, where he is represented as a sort of brilliant, political Mephistophiles, very powerful with king and lords, but thoroughly devoid of fixed convictions, and ready to accept place at any time, at any sacrifice of principle. Great complaint has been made of Lord Campbell, but it is probable that he is sustained by facts, so far as he charges Lyndhurst with political inconsistency. It is certainly true that Lord C. J. Denman, the most honest and fair-minded of men, and Lord Melbourne, the prime minister, the most tolerant of men, both publicly and angrily denounced Lyndhurst as a monster of political tergiversation. And Greville, in his celebrated Memoirs, says of him, that "he is a lawyer of fortune, in the same sense that we speak of a soldier of fortune," and complains bitterly that such a man should have such paramount, and even arbitrary, influence in the house of lords. Besides this, it is undeniably true that Lyndhurst began life as a violent Radical, full of eloquence upon the subject of liberty, equality and freedom, but as soon as his talents had brought him into sufficient notoriety to attract the attention of the government, and he had been placed in parliament through their influence, his radicalism disappeared and he was transformed most suddenly and violently into a Tory as ultra as old Lord Eldon. This, of course, speaks for itself. But we do not regard the charge of political inconsistency as a very damaging one, even if true. It is certainly a very common charge, and is made against every public man who has figured for any considerable length of time in politics. It was made against both Mr. Webster and Mr. Calhoun. Most young men, of lively imagination and warm sympathies, begin life as Radicals, Reformers, or something of the kind, and just as certainly change, and soften down into more or less decided Conservatives. We do not think the friends and admirers of Lord Lyndhurst

need take the charge as such a grave one. The best way to meet it, seems to us, to confess and avoid, i. e., to admit the change of views, but deny that it arose from dishonest motives. This can be said for Lyndhurst, that after he had once become a Tory, he remained fixed and constant to them, whether they were in the sunshine of popular favor or out of it.

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"A Treatise on Warranty in Fire Insurance Contracts," by Fontaine T. Fox, Jr., late vice chancellor of the Louisville Chancery Court, is one of the latest works of a legal character issued from the press of Callahan & Co., of Chicago. This is, without doubt, the most ambitious work ever given to the profession by a Kentucky lawyer. Though polemic in character, it treats the subject of Warranty in Fire Insurance Contracts in its broadest legal view; discusses in a fair and open manner the leading American cases bearing upon the subject, and formulates the result of the examination in clear and unmistakable rules of law. Judge Fox wastes no time in preliminaries, but in the very opening of his argument furnishes the reader with the legal principles which he proposes to discuss. In his opening paragraph Judge Fox thus limits his subject:

"Dissenting from the law in Warranty in the Fire Insurance Contract as presented by both Mr. May and Mr. Wood in their works on Insurance, I propose in this treatise to discuss the doctrine of warranty in presenti as it is technically called by the judges and text-writers. I believe the doctrines as stated by them to be entirely wrong in principle." He then proceeds to state an important distinction between contracts of life and fire insurance. "The contract of life insurance is based upon the representations of the insured. The questions asked are intended to ascertain the facts as to the past and present health and physical condition of the person whose life is to be insured. In their very nature they are intended and expected to be truthful representations of the facts as they exist at the date and delivery of the policy. They are, therefore, in and from their very nature and purpose, a warranty in presenti, and when discovered to be intentionally false the contract is.

void." But it is otherwise with the contract of fire insurance. "Let us take a familiar illustration of such a contract, say on a building described as a two-story brick house occupied as a dwelling house, insurance to begin at noon 15th of January, 1882, and to expire at noon 15th of January, 1883. I contend that by this contract the policy holder had agreed that this house should remain tin roofed and be occupied as a dwelling house for the entire year, and during each day of the year, and that the policy holder bought and the company sold the policy upon this property, the rate being estimated upon the presumption that the condition of the house would remain as specified during the running of the risk, to wit, for the entire year, in other words, that this condition, use and occupancy of the insured property was a continuing warranty for the year." The idea then which the book is intended to establish is that both Mr. May and Mr. Wood are in error when they state the law to be that the description of the house in the policy of fire insurance is merely a warranty in presenti, to be true on the day and date of the issue and delivery of the policy, but not to be a continuing warranty during the running of the risk.

After a minute examination of many American cases upon the subject, the author concludes that Chief Justice Shaw, as in Houghton v. Insurance Co., 8 Met., —, arrives at the correct rule of law. Had the writer embraced the English decisions in his analysis he could easily have enlarged his already strong citation of authorities with such cases as Sillem v. Thornton, 3 El. and Bl., wherein Lord Campbell held that the description in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from that description.

One of the most unsatisfactory features to be met with in many law books arises from the difficulty the reader has in ascertaining the position of the author as to the question discussed. We are frequently referred to an indiscriminate array of cases, and are expected to harmonize and distinguish them for ourselves. We have often heard this criticism made upon the writings of Judge Story and of Judge Parsons. No such criticism, however, can be brought against Judge Fox. On page

188 he gives us in an open, manly way what he conceives to be the result of his work.

The act of the Kentucky legislature, passed February 4, 1874, which provides that all statements and descriptions in applications for insurance should be deemed and held representations and not warranties, will deprive this interesting work of some of its value in this State.

The literary style is excellent, and though lawyers will be found who will disagree with some of the learned judge's views, we confidently assert that no one will misunderstand him, or remain in doubt as to his position.

We have seen a letter from Lord Justice Bramwell (an English judge who has given this subject considerable attention), in which he expresses his concurrence with Judge Fox's views and speaks in a very complimentary manner of the work. The publishers have done their part well. Both the paper and type are of the best, and in striking contrast with that seen in the average latter-day law book.

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## CORRESPONDENCE.

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I. C. S.—No. Mr. Wallace died recently in his sixty-eighth year. He was reporter of the U. S. Sup. Ct. from 1863 to 1875; he also published an American edition of Smith's Leading Cases, jointly with Mr. Hare.

E. B. C.—Judge Joshua Bullitt was one of the judges of the Court of Appeals from 1861 until in 1864. He was addressed out of office under article 4, section 3 of the Constitution, on account of his political opinions, supposed to be too favorable to the Confederacy. He is now a member of the Louisville bar.

O. R.—The remark which you attribute to Lord Brougham was made by Lord Campbell, in his life of Lord Lyndhurst. He says there are only four ways of rising at the bar: First, by huggery, which is the English for our boot-licking; second, by writing a book, as did Lord Tenterden (Abbott on Shipping), and Baron Park (On Insurance); third, by quarter sessions; fourth, by a miracle, which consists in the opportunity of and the ability to make a great speech in a great case.

All wise men are of one religion, and that religion wise men never tell.—Lord Shaftesbury.

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"Have you ever before been punished by the law?" asked an Austin justice of a colored culprit. "Yes, I called a man a liar, and I had to pay a fine." "Is that the only time you have come in conflict with the law?" "Now dat you speaks ob hit, jedge, I bleeves I was in the penitentiary for ten yeahs, if I disremembers myself."—Exchange.

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"Is it wrong to cheat a lawyer?" asked a farmer of a judge. "You just try it and see," replied the judge. "If not wrong, you'll find it unfortunate."—Nashville Iron and H.

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The enterprising arithmetical editor of an English paper, quoted by one of our Nashville exchanges, has estimated the total wealth of the world at $214,000,000, he then proceeds with his calculations in this way:

If the amount of capital existing in Great Britain were divided among its inhabitants, every individual over fifteen years of age would receive £403, whereas if the capital of South America were divided it would only leave about £56 for each person. If, however, the total capital of the world were equally divided it would give much less than the average for the richest country, and much more than the average of the poorest.

The result of such a division would be the sum of about £103, and thus if all the capital in the world were divided amongst all the people of fifteen years of age and upwards there would be £103 for everybody.

THE

# KENTUCKY LAW REPORTER AND JOURNAL

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## CURRENT TOPICS.

The Illinois Supreme Court, in the case of Timms v. Harrison, has just held that the "High License" Liquor Law is constitutional. The law provides that towns and villages are prohibited from granting licenses for the keeping of dram shops except upon the payment of a sum not less than at the rate of $500 per annum, or not less than $150 per annum when the license is for the sale of malt liquors only.

There is great indignation expressed against the Supreme Court of New Hampshire, which locks its opinions up as soon as delivered, and will not allow any of them to be published by the law journals, either in or out of that State. It is said that opinions delivered by the court four years ago are not yet published. The question has been taken hold of by the State legislature, and a law passed requiring decisions to be published within four months after they are rendered. We can not imagine how that venerable fiction of the common law—that every man is presumed to know the law—can be tolerated at all, unless encouragement is given to the law journals as a prompt means of spreading the opinions of the court before the people and profession.

No cases present questions of greater interest than those which relate to a conflict in jurisdiction between the State and United States courts. The following is one of the latest: One Robb, as agent of the State of Oregon, held a prisoner in charge who had been delivered to him under a requisition of the governor of Oregon upon the governor of California. A habeas corpus was sued out of a State court by the prisoner, but Robb refused to obey the writ, claiming that he was acting under the Federal Constitution, and was, therefore, not amenable to a State court. He was, therefore, committed for contempt, and filed his petition in the Federal court for a release. And it was there held by Sawyer and Sabin, J. J., that after the State court was judicially apprised that the prisoner was held under a requisition it could proceed no further, and the committal was unauthorized. The United States Supreme Court also seems to have so held in Albiman v. Booth, 21 How., 509, and in the Priggs case, 16 Pet., 539.

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A very interesting and important question is determined in City of Denver v. Bayer, Colorado Supreme Court, December 1883. The case involves the right of a steam railroad to run through the streets of a city. The owner of an abutting lot has an easement in the street which he holds subject to the right and power of the city to alter and improve the streets for the greater convenience of the public. Thus the city can raise or lower the grade of the street, or authorize the running of a line of street cars, and the lot owner, though injured by the change, can recover nothing for the resulting damages to his property. He is presumed to have bought his property in contemplation that such changes might be made. But this is not applicable to a steam railroad, which is not a local convenience; does not stop at the beck of any one who wishes to ride, its ties and rails are a permanent interference with the use of the street; the smoke and noise are a great annoyance, and the danger a perpetual menace to both pedestrians and vehicles. To construct it, therefore, through the streets is to impose an additional burden or servitude not within the proper use of an ordinary public street, and compensation must be made to the abutting lot owner for any diminution in the value of his pro-

perty. And the ordinance which gave the right of way to the railroad having exempted it from making such compensation, was unlawful and contrary to the Constitution of Colorado, which provides that private property shall not be taken or damaged for public use without compensation. The court gives full weight to the word damaged, and marks those cases that have held a contrary doctrine as decided under constitutions that did not contain that word, but gave compensation only for property taken.

The Constitution of Kentucky belongs to this latter class, as it provides that property shall not be "taken or applied" to public use without compensation, and it was accordingly held in Jeffersonville, &c., R. R. Co. v. Esterle, 13 Bush, 667, that the abutting lot owner could not complain of any infraction of this constitutional provision because it could be said only that the railroad had impaired the property, not applied or appropriated it. But in that case the owner was allowed to recover of the road for damages in trespass on the case.

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The familiar controversy which has been carried on for so many years as to whether a stranger to the consideration can sue to enforce the contract, has received a new contribution in the case of Pruitt v. Pruitt, lately decided by the Indiana Supreme Court. A, in a conveyance of land to him from B, agreed to pay C, B's son, a certain sum as part of the purchase money. After the deed was recorded, and before the son was aware of the arrangement, A reconveyed to B, and the contract was rescinded. B then conveyed to D, who was ignorant of all these proceedings, receiving full value. Held, (1.) That the promise of A was binding upon him as soon as accepted by C (2.) That the latter being a minor, the law implied an immediate acceptance, it being for his benefit, and, therefore, it became irrevocable. (3.) That a vendor's lien was created upon the land in C's favor. (4.) That the record of the deed sufficently apprised D of C's rights. (5.) That C might maintain an action in his own name to enforce the lien.

Any one who is interested in this question will find a valuable article on it in the January number of the American Law Register, where the authorities are reviewed and classified.

The following, bearing upon the right of an attorney to retire from a case and yet recover compensation for his services, will be read with interest. It is taken from the case of Tenny v. Berger, 493 New York, 524:

"An attorney retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination; and if, before such termination, he abandon the service of his client without justifiable cause or reasonable notice, he can not recover for the services he has rendered. The employment, however, by the client, without the consent of, or consultation with, the attorney, of a counsel with whom the attorney's relations are such that they can not cordially cooperate, is a justifiable cause for his withdrawal from the case, and upon such withdrawal the client is liable for services rendered."

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When defendant interposes the plea of infancy to plaintiff's right to recover for goods sold and delivered, it is a complete answer and bar to recovery on the contract; but the infant is still liable to account for whatever benefit he may have received from the purchase, though the goods purchased may not have been necessaries. Merrimack, &c., v. Butterfield, New Hampshire Supreme Court. And in Anderson v. Soward the Ohio Supreme Court has recently held that where a person of full age promises to perform a contract entered into during his minority he thereby ratifies the contract, although he does not know at the time of the promise that by reason of his minority at the time of the contract he is not legally liable thereon.

But in this State, where ignorance or mistake of law is ground for relief, such a ratification would, perhaps, not be binding.

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The advocates and opponents of codification are at it again in New York. The dispute is being carried on with the usual heat, mixed with many arguments on both sides, and not a little abuse also. The latest contribution is from Mr. David Dudley Field, the Goliath of the codifiers. The style of his artcle may be imagined from the following: "It would be blindness

not to see, and disingenuous to deny, that American and English lawyers are, from the beginning of their studies, nurtured with such a diet of prejudice that the chances are against their believing anything new to be true, or anything old to be false. As a rule we might as soon expect a Mohammedan to take a Christian to his bosom as a case lawyer to take a code to his. His heart may be as pure as snow newly fallen on the mountains, yet whenever an amendment of the laws is proposed we may find him standing at the gates of reform, with a battered shield on his breast and an old javelin in his hand. The average practicing lawyer is, and has always been, against law reform."

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The well-known rule that the law will not attempt to adjust acounts between the parties to an illegal transaction, but will leave them where it finds them, is qualified by the Ohio Supreme Court in a late case, Norton v. Blinn, where it was held that if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal he is bound to turn it over to him, and can not shield himself from liability therefor on the ground of the illegality of the original transaction. The point at which the courts in such cases will interfere is well illustrated by the case of German, &c., Church v. Stegner, 21 Ohio State, 488, wherein it is held: "While a promissory note given to, and discounted by, a corporation for a loan of money in the course of an unauthorized banking business will not be enforced, yet where the treasurer of such corporation has taken and appropriated to his private use moneys deposited with it contrary to the statute against unauthorized banking, and being unable, when called on, to refund the same, secures it by his promissory note, such note will not be held to have been given in the course and furtherance of an illegitimate business, and an action will lie thereon."

The fact that an attorney acts as a witness in an action does not affect his right to compensation for his services as attorney. (Perry v. Dicken, Pensylvania Supreme Court, February, 1883.)

In Wells, Fargo & Co. v. Oregon, &c., Ry. Co., Judge Deady, United States Circuit Court of Oregon, makes another important contribution to the law upon the subject of the duties of railways to express companies. He holds that it is the duty of a railroad company to furnish equal facilties to all express companies doing business on its road, and that it can not descriminate in favor of any one company; that ferriage on the railway ferry of the defendant, if not absolutely an express facility, to which the plaintiff is entitled, becomes so when furnished to another company doing an express business over the road.

Upon a subject kindred to this there is a very interesting article in the February number, American Law Register—"State Legislation Regulating Railroads." It is said that "a review of railroad regulation in the United States shows that no solution of this perplexing problem has been attained. All is yet in a transition state. From an inflexible system of repression the western legislatures have come to recognize the truth that there must and fairly may be certain inequalities in rates. But the legislation on this subject has generally had a beneficial effect in this country. The railroads have been constrained to explain the principles on which their freight tariffs are based, and thus the public have gained much valuable information as to the distinction between just and unjust discrimination, and between practices based upon economic considerations and sound commercial principles and such as constitute abuse of the rights and privileges conferred upon the companies." The drift is not at all in favor of letting the roads alone, or of abandoning the principle of regulation. The writer concludes that the expedients which promise most for the future are boards of railroad commissioners, who shall be students as well as supervisors of the railroad system, and a judicious extension of the equity juirsdiction of the courts, especially in the line of mandatory injunctions. The article reviews the English and the various State statutes on this subject, and will be found very valuable reading.

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In an address recently delivered by the president of the incorporated English Law Society, he said, in speaking of the

changes made by the new rules of procedure: "Probably the most important change, or at any rate one which will most strike the public, is that with respect to the mode of trail. In actions for slander, libel, false imprisonment, malicious prosecution, sedition, or breach of promise of marriage, either party may demand a jury as of right. Actions in the chancery division are to be tried by a judge alone unless otherwise ordered, while the court may order the trail before a judge only, of cases involving the examination of accounts or scientific inquiries, or similar matter which can not be conveniently tried before a jury; while in all other actions, if either side desire to try with a jury, an order must be obtained. But where no application is made for a jury the prescribed mode of trial is to be by a judge alone. Already the profession has had a considerable experience in trying before a single judge what were formerly jury cases, and there can be little doubt but that the result has been so satisfactory that in the future, in the great mass of cases, the time-honored institution of a trial by jury will be the exception and not the rule."

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In a paper read at the last meeting of the Tennessee Bar Association the following significant suggestions were made: That (1.) we should have a national code of procedure regulating both practice and pleading, and making it uniform in all the States. And (2.) that there should be national legislation upon all subjects that are not properly local in character. Thus, upon the following subjects, there is no reason why the laws in each and every State throughout the Union should not be the same: Insolvency, conveyancing, descent and dstribution, probate and registration of deeds and wills, marriage and divorce, commercial paper, rates of interest, etc. But the American Law Review, commenting on this, says: "A written constitution has quit us in a strait jacket which has become too small for us. It is hard to be worn. It must be enlarged and remodeled. But Congress can not supply the remedy, as Mr. Ruhm seems to think. The remedy can only be found in great constitutional changes. This can not be brought about in a day. Public opinion must first be prepared for it; am-

ple discussion must precede it; public opinion must, in some degree, unite as to the scope and extent of the remedy desired. It is the duty of the great and powerful profession of the law to lend its attention to this subject. Scarcely a Bar Association meets without its being agitated in some form. Mr. Ruhm proposes to lay the axe at the root of the tree. He may be called a visionary, but when a visionary gets upon the right track he can not be laughed down. The progress of American unification must go on. It can no more be stopped than the progress of German unification can be stopped. The narrow jealousies of one hundred years ago, which made us a mere aggregation of tribes or petty communities, dignified by the name of States, furnished a plan of government entirely unsuited to a great and homogeneous people. If we are to have States, instead of having thirty-eight small ones we had better have eight or nine large ones, divided on a plan similar to the Federal circuits. But States are good for the purposes of local administration. The trouble is that a great many things which were really local one hundred years ago have, through increased means of intercommunication, become general, hence national."

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## KENTUCKY COURT OF APPEALS.

### TATE v. HAWKINS, &c.

(Filed January 26, 1884.)

1. Limitation—Acknowledgment—Where the endorsement of a partial payment on a note is relied on to prevent the statute of limitation from running, it must be proved that the partial payment was actually made at the time of the endorsement or at least that it was made within fifteen years after the maturity of the note.

2. Lien note—Remote vendee of land—Where an acknowledgment of liability on a note is made after the note becomes due, the statute begins to run anew from the date of such acknowledgment, and the action is not barred till fifteen years have elapsed, reckoning from such acknowledgment and not from the time the note first matured. But this rule does not apply where the note represents the purchase price of land and is secured by lien on the land which has passed into the hands of different vendees, the lien as against the remote vendee is barred in fifteen years from the time the note first became due and not from the time of the last acknowledgment.

3. Lien—Purchase money—Vendor waives his lien for unpaid purchase money as against both subsequent purchasers and creditors by failing to state in the deed the amount remaining unpaid, but the lien still exists against his immediate vendee.

4. Where an action on the note is barred, none can be maintained to enforce the lien by which the note is secured.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Lewis.

July 31, 1861, in consideration of a tract of land sold, but not conveyed to him until March 17, 1862, appellee Hawkins executed a promissory note to the vendor, Jennings, payable March 17, 1863, to secure the payment of which a lien was reserved in the deed.

March 15, 1864, Jennings' executor, in writing thereon, assigned the note, without recourse, to appellant, the residue then agreed to be due having, as appears from a memoranda written at that time upon the note, and signed by Hawkins, been paid off by him for appellant.

On the same day Hawkins sold and conveyed the same land to Basket, the deed therefor being acknowledged and lodged for record April 16, 1864.

Basket, having paid the full consideration, took possession of the land and held it until March 23, 1875, when he sold and conveyed it to appellee Milner, who paid him therefor, and has held is ever since.

This action was brought March 21, 1881, against appellees, Hawkins & Milner, to secure personal judgment for the amount of the note unpaid against the first named, and to enforce the lien retained in the deed from Jennings, and subject the land in the possession of the latter to the payment thereof.

No defense was made by Hawkins, and personal judgment for the debt was rendered against him. But Milner resisted enforcement of the lien, and judgment was rendered dismissing the petition as to him.

We do not agree with counsel for appellee that the memorandum upon the note signed by Hawkins imports nothing more than an acknowledgment by him of the amount of the note then due. The assignment by Jennings' executor invested appellant with the legal title to the note, and the right to

maintain an action thereon for the residue of the debt due, and the enforcement of the lien upon the land for its payment.

The principal ground relied on by appellee Milner as a defense to the action is the statute of limitation.

It appears, from endorsements on the note, that several payments were made by Hawkins subsequent to the assignment to appellant, one of them being dated March 10, 1873, which was within fifteen years from the time the cause of action accrued, and another was dated March 16, 1878, which was after the lapse of that period. And counsel for appellant, relying upon the cases of Hopkins v. Stout, 6 Bush, 375, and English v. Wathen, 9 Bush, 381, contends that the partial payment made within the required period was prima facie an acknowledgment that the balance of the note then remained unpaid, and suspended the running of the statute prior to the date of that payment.

But before this rule can be applied in this case, if it applies at all, it should, if the fact is controverted in the pleadings, be proved that the partial payment was made at the time it purports to have been made, or at least within fifteen years from the time the note became due. (Frazer, &c. v. Frazer, 13 Bush, 397.)

As, however, it is not clear either that the issue of fact was properly made in the pleadings, or that it was proved the partail payment was made within the time required to avoid the statutory law, we will proceed to the main and decisive question, whether, according to the rule adopted in the cases referred to, the partial payment made by Hawkins has had the effect to suspend the running of the statutes to the prejudice of Milner, the remote vendee.

In Hopkins v. Stout, supra, the following language is used: "The philosophy of a peremptory law by statutory prescription results from two combinations: First, from the prescribed lapse of time, nothing else appearing, the law presumes satisfaction or exoneration; and, second, the danger of the loss of evidence of extinguishment prudently makes the presumption intraversible and conclusive. But the acknowledgment within the statutory time defeats the presumption up to that time, and makes a link in the continuous running of the statute, and consequently the antecedent time is not counted in computing the

bar, and that disuse operates so as to elongate the statute to a corresponding extent, and to postpone the cause of action to the date of the acknowledgment, just as the statutory saving of any sort of obstruction would do, the party making the acknowledgment waives past time and is estopped from pleading it; and, therefore, the bar is not complete until the required time shall afterward run without further obstruction or recognition of the cause of action. The presumption of exoneration commences after such recognition; and if there shall be subsequent satisfaction the posterior time must be long enough to authorize the presumption of it per se and alone. In an action brought before the interlapse of the time required by the statute, satisfaction in the meantime will not be presumed as a deduction of law, and the debtor could not complain of an elongation resulting from his own act."

In the subsequent case of English v. Wathen, supra, the rule was adhered to, it being held that an "admitted payment * * * within fifteen years before the institution of the suit, which was not qualified or restricted by the evidence in its legal import or effect, was prima facie evidence of an acknowledgment as of the date, that the residue of the debt, as appearing from the note, remained unpaid, and of continuing liability therefor, and consequently sufficient to suspend the operation of the statute between the accrual of the cause of action on the note and the date of payment."

Acording to the doctrine thus announced the statutory bar of fifteen years is not complete until the required time shall have run after the last partial payment, or "the last obstruction or recognition of the cause of action," and consequently appellant might have brought this action against Hawkins at any time within fifteen years from March 16, 1878, the date of the last payment, or more than thirty years after the note fell due; and if the rule be applied to his lien upon the land he would have a longer period within which to enforce it than is allowed to persons having title, though laboring under disabilities, to maintain an action for the recovery of the land itself.

In our opinion analogy, as well as the reason and policy of our statutes, forbid the extension and application of the rule to the prejudice of the remote vendee, Milner. "A statute of

limitation," says Justice Story, "instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended to be, empathically a statute of repose." (Bell v. Morrison, 1 Pet., 360.) And in the language of another judge: "This is not the epoch when that statutory protection which the legislature has wisely thrown around us as a safeguard against fraud and oppression should be frittered away by judicial refinements and subtle exceptions that never entered into the contemplation ofi ts enlightened framers, and it has for many years been a subject of avowed and sincere regret with the most distinguished judges and eminent jurists of the age that any constructive innovations were ever engrafted upon acts of limitations." (Justice Dorsey, in Green v. Johnson, 3 Gill. & John. (Maryland), 394.)

Having in view the further repose and security of innocent purchasers of real estate against fraud and oppression, not only did the legislature, by the Revised Statutes, reduce the time within which an action may be maintained for its recovery, from twenty to fifteen years, but it was provided that "when any real estate shall be hereafter conveyed, and the purchase money, or any part thereof, shall remain unpaid at the time of the conveyance, the grantor shall not thereby have a lien for the same unless it be expressly stated in the deed what part of the consideration remains unpaid," and the same provision was engrafted in the General Statutes.

The effect of this, as construed by the court, has been to so far change the law existing prior to the Revised Statutes that the vendor is held to waive his lien as to creditors and subsequent purchasers unless he complies with the statute and expressly states in the deed what portion of the purchase money remains unpaid. But the lien still exists, upon equitable principles, against the immediate vendee, who must know if the price is not paid, and against volunteers under him, who can occupy no better position than he does himself.

The language of the statute is peremptory that civil actions upon promissory notes shall be commenced within fifteen years after the cause of action first accrued, and not after; and it has been held by this court that when an action on the note

given for the purchase price can not, on account of the statutory law, be maintained the lien, which is only a mere security, can not be enforced, the court using this language: "The lien is only a peculiar sort of resulting trust, and the statute of limitations applies to an implied trust; besides, had the trust been express and not within the statute, still it could not be enforced as a mere incident to the debt, which is the principal, if the debt is paid or barred by time." (Williams v. Smith, 4 Bush, 541.)

By the terms of the statute the action of appellant on the note was barred fifteen years after the note matured, and he had then lost his right to maintain the action for the enforcement of the lien.

If appellee Milner is now to be deprived of the safeguard provided by law, and upon the faith of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute, and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him.

This court has, in the two cases referred to, held that Hawkins could, by his own act, elongate the statute, and continue his liability upon the note beyond fifteen years from the time it fell due, but it was not, nor ought it to be, determined that Milner should thereby suffer.

The lien is a charge upon the land which it is not the policy of the law, nor in accordance with the analogy of the law, should exist longer than the statutory existence of the note; and if reasons were necessary to justify this salutary and necesary principle, they are afforded by the circumstances of this case. Appellant is shown to have known of the purchase by Basket, and of the sale by him to Milner, and from his relation to Hawkins, being a brother-in-law, must have known that Hawkins was paid in full for the land, yet he continued to indulge him for more than fifteen years, and until he became insolvent, and then attempted to subject the land to the payment of his debt.

The consideration for this indulgence, whether friendship for Hawkins or his agreement to pay usurious interest, did not

benefit Milner. In our opinion the statute should not be thus perverted, in letter and spirit, for the benefit of a creditor guilty of such laches.

The judgment must be affirmed.

N. McMercer and Wm. Lindsay for appellant.

John Allen Murray and Wm. Milner for appellees.

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## ORR, &c. v. BRACKEN COUNTY, &c.

(Filed February 9, 1884.)

1. Corporation—Mandamus—Election of officers—Mandamus is the proper remedy to issue at the instance of a stockholder of a private (as well as a public) corporation to compel the officers to hold an election for new officers.

2. Charter—Amendment—Acceptance—Where the legislature amends the charter of a corporation by taking away the right of the stockholders generally to elect officers and conferring that right on a few, and the corporation refused to accept such amendment and even rejected it by a vote of its directors, Held—That the corporation is not bound by the amendment, and the courts can not compel it to hold an election of officers under the amendment.

Appeal from Bracken Chancery Court.

Opinion of the court by Judge Pryor.

This proceeding is for a writ of mandamus to compel the officers of a turnpike company leading from Augusta to Brookville, in Bracken county, to hold an election for officers of the corporation, and to direct the manner in which the vote is to be taken, and also to prohibit those who are now claiming to be the officers of the road from controlling it. Under the original act of incorporation the company elected its president, treasurer and ten directors, and in voting the stockholders were not entitled to a vote of each share of stock, but the vote so regulated as not to give the largest stockholder the right to elect. In May, 1880, the charter was amended, by which the number of directors was reduced to six, and each stockholder allowed a vote for every share of stock. After this amendment the board of directors ordered an election to be held at the usual time, and appointed inspectors to conduct it. The poll was opened, but no vote taken, for the reason that some claimed the right to vote as provided by the amendment of May, 1880, and others that the vote should be taken as provided by the original charter, and with this difference of opinion the

result was that no election of officers was had, and those in office continued to hold over.

We are not disposed to adjudge that the chancellor was without power to require an election upon the presentation of a proper case, regardless of the act of March 3, 1876, General Statutes, page 959. In cases of public corporations mandamus will lie to compel elections of officers, and it is said in Angel and Ames on Corporations, tenth edition, 708: "We see no reason why the same remedy should not lie aginst a private corporation, aggregate, to enforce an obedience to the charter, if they neglect or refuse to elect their proper officers." Then these stockholders, or those claiming that the election should be held under, and in accordance with, the act of May, 1880, are porperly in a court of equity.

The action was submitted by the plaintiffs (appellees) at the answering term, and on the condition that the statements of the answer were to be taken as true with reference to the election, and under the practice all the statements affecting the question at issue are to be regarded as true, when the defendant, filing his answer at the proper time, is objecting to the submission. It is alleged in the answer, and must be taken as true, that the act of May, 1880, was not procured by the board of directors, or by the stockholders of said company, or by a majority of them, or either of them, and was never ratified by the company, but, on the contrary, by a vote the directors refused to accept the amendment—that not more than one or two of the stockholders knew of the act until after the legislature adjourned. The amendment of 1880 reduces the number of drectors from ten to six, and by giving to the stockholders a vote for each share of stock increases the power of the larger stockholders to such an extent as virtually to disfranchise the small stockholders, and deprives them of the right to be heard, as under the original grant. From this amendment seems to have originated all the trouble, and with a road well managed and paying dividends, as but few turnpikes do in the State, the entire plan of organization is changed for the purpose of giving others control of the corporate property.

It is not pretended that the legislative power, if it exists, was exercised for the public good, but on the contrary, if the

answer is true, and its statements must be so regarded on the hearing, neither the legislature nor the stockholders who were interested were consulted with reference to the public interests, and the sole question presented here is whether one or two out of a number of stockholders will, without notice, be allowed to induce such legislation with reference to the charter as will sacrifice both public and private interests. Regardless of the constitutional question involved we have no hesitation in determining that the officers of the corporation acted properly in refusing to receive the votes as permitted by the amendment, and should have conducted the election, as they proposed to do, under the provisions of the original charter.

The acceptance of such an amendment by the corporation should not be dispensed with solely to gratify the wishes or advance the interests of those who obtained it without the consent of the corporate body. The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property, or of changing the object of the charter by taking from those having a right to select their officers under the charter that right and placing it in the hands of those whose stock, by reason of the increased power conferred by the amendment, are enabled to control the corporation. The right was not asked by the corporation, but granted by the legislature at the instance of a few stockholders, without the consent or knowledge of the others. Conceding the right of the legislature to make the amendment, the corporation declined to accept it, and, therefore, the order entered below, requiring an election must be reversed and cause remanded, with directions to set aside the order, and for further porceedings. The quesitons involved have been considered upon the statements of the answer alone, and an acceptance of the amendment may be shown, or that it was obtained at the instance of the corporaton. Judgment reversed and cause remanded for further proceedings consistent with this opinion.

J. Q. Ward for appellants.

A. Duvall for appellees.

# WILDER v. COMMONWEALTH.

(Filed February 9, 1884.)

**Rape—An indictment for detaining a woman for the purpose of having carnal knowledge of her must allege that the detention was against her will. It is not sufficient to charge that the accused "unlawfully and forcibly detained her." Indictments in such cases are to be construed most strongly against the Commonwealth, and no doubts or inferences resolved in favor of the indictment.**

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Hargis.

The indictment fails to charge that the accused detained Mary McGriffin against her will for the purpose, or with the intent of having carnal knowledge with her.

It is alleged that he unlawfully and forcibly detained her, but it is not averred anywhere that the detention was against her will.

Detention against her will is the main ingredient of the offense denounced by the statute. It does not require that the carnal knowledge shall be against her will, or that the intent to have carnal knowledge with her shall be coupled with the purpose of doing so against her will. Before any person can be lawfully convicted under the statute, which is subject to easy perversion or misuse, it must be alleged and proved that the female was taken or detained against her will. Words or acts of persuasion merely are insufficient, although they may detain the female, to constitute the offense. There must exist such acts or threats as to compel her to submit against her own will and inclination to the control of the accused, with the intent on his part to have carnal knowledge. This statute, while it is highly proper, may be perverted and used as a dangerous instrument of oppression or revenge, and, therefore, the rule which requires that allegations be construed more strongly against the pleader should be strictly adhered to in construing the language of indictments under it. No doubts or inferences will be resolved in favor of an indictment containing them, hence the accusation that the accused "unlawfully detained Mary McGriffin," without stating and affirming that it was against her will, is not sufficient. Nor is this defect cured by the averment that the accused forcibly detained her, be-

cause he may have used physical force in detaining her, yet his acts may not have been against her will, for she may have apparently opposed while she really inclined to favor the detention. In this class of cases the jury should be so instructed as to allow them to judge of the reality and causuality of the alleged detention.

Wherefore the judgment is reversed and cause remanded, with directions to grant appellant a new trial and sustain the demurrer.

W. B. Smith and R. Mason for appellant.

P. W. Hardin for appellee.

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## BENNETT v. BAIRD.

(Filed January 18, 1883.)

**1. Homestead—A owned two tracts of land adjacent to each other which he worked together as one farm. On one of the tracts there was a dwelling house but this tract he sold, still continuing to reside on it, however, as tenant of his vendee, and supporting himself and family off the other tract, on which there was no dwelling house. Held—He was entitled to a homestead in this latter tract. It is not essential to a homestead right that there should be a dwelling house on the land.**

**2. No construction of the homestead law unfavorable to the debtor should be adopted except to protect creditors and purchasers against fraud.**

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Lewis.

In September, 1880, a tract of land belonging to appellant, estimated to contain 156 acres, and valued by the appraisers at four hundred dollars, was sold under execution, and purchased by appellee Baird at the sum of four hundred and ten dollars. And in October, 1880, appellant brought this action for the purpose of quashing the execution sale; but if that could not be done then for the allotment of a homestead in the land to him. We perceive no sufficient grounds for quashing the sale and the only question, therefore, is whether appellant is entitled to the homestead claimed.

It appears that, until about two years previous to the issue of the execution and sale under it of the tract of 156 acres, appellant owned another tract adjacent to it containing about 144 acres, upon which his dwelling house and appurtenances

were situated, at which time he sold the latter tract to pay a mortgage debt he owed the purchaser, but continued to occupy the dwelling house and a small part of the tract as a tenant of his vendee until about April, 1881, when he erected a small house upon the land in controversy, and removed to it with his (defendant's) daughter, the only member of his family.

It is shown that appellant owned, occupied and used the two tracts of land as one farm for many years previous to the sale of the tract of 144 acres, portions of each being in the same enclosure. In fact it does not appear that they were ever divided and distinguished as two separate tracts at all until the mortgage and sale by him of the tract of 144 acres.

It is further shown that, though occupying the dwelling house upon the last-named tract after he had sold it, appellant continued, as he had before done, to hold, control and use for the support of himself and family the tract of 156 acres, being the only land owned by him until it was sold.

The question as thus presented is whether, all the other conditions prescribed by law for the exemption of a debtor's land from enforced sale existing, appellant has forfeited or lost his homestead right in the land because there was no dwelling house thereon at the time it was levied on and sold.

The language of section 9, article 13, chapter 38, General Statutes, is that "there shall be exempt from sale under execution, attachment or judgment of any court, except to foreclose a mortgage given by the owner of a homestead or for purchase money due thereon, so much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars."

This court, in the case of Brown Bro. & Co. v. Martin & Co., 4 Bush, 47, held that "the right of exemption depends upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a house for himself and family, and the right does not exist when the residence of the debtor and family is permanently located elsewhere." But in the same case it was said not to be then "necessary to decide whether a habitable tenement on the premises in all cases requisite to the existence of a homestead right."

The question has not been directly presented to or decided by this court, but, in our opinion, the statute does not, in terms or spirit, make it an indispensable condition of the use and enjoyment of a homestead right that there shall in all cases be a dwelling house upon the premises claimed to be exempt.

By section 10 it is provided that before a sale of land occupied as homestead the officer in whose hands the execution may be shall cause such part thereof, which may be selected by the defendant, as shall not exceed in value one thousand dollars to be valued under oath and set apart to him, etc.

Under this section the debtor, for obvious reasons, is not restricted to that part of the land upon which the dwelling house is situated, but may select any part that may be best adapted for the support of himself and family, which is the main object of the homestead law.

Appellant having paid his creditor by a sale of a part of his land, which appears to have been done in good faith, for the same reason was entitled to a homestead right in the residue. And if he had erected a dwelling house thereon and occupied it before the execution issued, under which the land was sold, there could have been no question of his right to the exemption.

It is true about two years elapsed from the time he sold the tract of 144 acres until the execution isued, during which period he resided thereon. But his residence there can not be regarded as permanent, nor did he abandon the possesion or use of the other tract or the purpose and intention to use and enjoy it as a home for himself and family by erecting a dwelling house thereon, for he owned no other land. And that he did not carry out that purpose and intention sooner than was done may, from the facts in this case, be reasonably attributed to his lack of ability and means.

No construction of the homestead law not necessary for the protection of creditors and purchasers against fraud should be adopted which tends to defeat the object of its enactment. Certainly it should not be so construed as to operate most harshly upon those most in need of its protection.

In our opinion appellant is entitled to the homestead claimed, and the judgment of the lower court must be reversed and

cause remanded for further proceedings consistent with this opinion.

Townsend & Massie for appellant.

Walker & Hubbard for appellee.

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## CONNECTICUT MUTUAL LIFE INSURANCE CO. v. SCOTT, &c.

(Filed January 12, 1884.)

1. Surety—Agent—Notice—Where an employer discovers a shortage in the accounts of his agent it is his duty to notify the sureties of the agent of such shortage, and if he fails to do so and continues to entrust business to the agent, the sureties are not liable for any money collected by the agent after the discovery. The sureties are discharged, however, only from the time such discovery is made by the employer and not from the time he might with due diligence have discovered the shortage. The employer is not bound to use diligence to make the discovery, but must report it as soon as made.

2. Where appellees were the sureties of A as agent of an insurance company, and the company knew of and acquiesced in (though it did not expressly consent to) the admission of A's son as a partner in the agency and suffered its business to be done by A & Co. Held—The sureties are not liable for money collected by or acts done by A & Co.

3. Corporation—Notice—A corporation is affected by knowledge possessed by its president or other officer who transacts its daily business. It is not necessary to bring the knowledge home to the board of directors.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

Ryan, as principal, with Scott and Leathers as his sureties, executed bond to the appellant company, in the penal sum of $20,000, stipulating for the faithful discharge of duty by Ryan as agent of apellant.

This action was brought by appellant on the bond, alleging as a breach thereof that Ryan as agent had collected and failed to pay or account for the sum of $20,427.64, received after the execution of the bond and before his discharge, and that he had not kept true and accurate accounts of his receipts and disbursements. These allegations were controverted by the sureties, who also pleaded various matters which will be hereinafter considered, as a discharge from their obligation.

At the date, March 18, 1875, of the execution of the bond, Ryan and Carpenter, who had prior thereto been agents for the appellant, were liable for more than $21,000 on their agency;

but neither the appellant nor the sureties had any actual knowledge of that fact, the appellant, however, could, by the use of proper diligence, have discovered it. This is the first point to be determined. We are satisfied that the failure to use such diligence and inform the sureties of the results before they became bound was not a fraud, there being no proposed suppression of the fact or intentional failure to investigate Ryan and Carpenter's accounts to avoid learning their condition. The mere reappointment of Ryan as agent was not, in the absence of knowledge of the failure of Ryan and Carpenter, a representation of his financial honesty upon which the sureties could rely as a release from the obligation of the bond after its breach. It was more their duty than that of appellant to make inquiry of Ryan's condition before they bound themselves for him, and they can not, therefore, complain of appellant's failure to investigate his accounts. They were entitled to good faith at the hands of apellant, no more. This they received in all that pertained directly to the execution of the bond, and as both were simply negligent, not fraudulent in their conduct, the sureties have no legal or equitable ground for complaint on that score. (Magee v. Manhattan Life Insurance Co., 2 Otto, 93.)

The appellant did not solicit the sureties to execute the bond; there was no intercourse between them or its officers prior to the execution of the bond that would have required the disclosure by it of any fact which would have led to the discovery of the condition of Ryan and Carpenter's acounts, and the sureties did not seek any information at the hands of appellant as to the state of those acounts.

And as the silence of the appellant, in the absence of knowledge of the indebtedness of Ryan and Carpenter, could not have amounted to an express affirmation or negation with reference to that fact, there is, according to Story's Equity Jurisprudence, sections 214, 215, and the case of Ætna Life Insurance Co. v. Mabbitt, &c., 18 Wis., 667, an entire failure by appellees to make out the charge of fraud, the appellant not being guilty of suppressing, or failing to disclose, any fact within its knowledge which increased the risk of the sureties.

The circumstances prior to, and attending, the execution of the bond do not raise the inevitable inference of deception upon the part of appellant or its officers, and the fact alone of Ryan's reappointment being insufficent to uphold the allegation of misrepresentation, there can be no doubt on this point. The bond was bindingly executed. (Hamilton v. Watson, 12 Cl. & Fin., 109.) In April, 1878, the appellant discovered the indebtedness of Ryan and Carpenter, for which they were jointly and severally bound, yet without notifying his sureties, retained Ryan as agent, entrusting business to him in the usual course until November, 1878, when the appellant discharged him.

The authorities are conclusive that the sureties can not be held bound for any failure of duty by Ryan ocurring after the discovery in April, because the appellant failed to communicate the knowledge it had acquired to the sureties. And were authority obscure on this point principle would sustain it, because nothing could be more repulsive to common honesty than for the appellant, with knowledge that the agent was violating his bond, and putting to extreme hazard the rights of his sureties, allow him to proceed in his course without notifying them of the facts, so they might refuse to consent and take steps to protect themselves. Nor is it any answer that the appellant requested Ryan, who promised to do so, to communicate his own dereliction to his sureties, for that shows no reasonable effort by appellant to inform the sureties. (Phillips v. Foxhall, 7 L. R., Q. B., 666; Sanderson v. Aston, 8 L. R. Excheq., 73; Franklin Bank v. Cooper, 39 Maine, 542; Graves v. National Bank of Lebanon, 10 Bush, 23.)

Shortly after the execution of the bond Ryan began a course of business as agent which was calculated to convince strangers that he and his son were partners in the agency.

It is contended by counsel that the appellant did not consent to the formation of the partnership or knew of its existence, if it ever existed, which is denied. But there is a rule of common sense, as well as lawful and logical presumption, requiring that material acts and things which from the facts or circumstances surrounding them, ought to be known, will be treated as understood. And it is applicable to the facts bearing upon this controverted point.

A brief recitation of them will be sufficent argument to show that the appellant knew, or ought to have known, of the existence of the partnership, and actually acquiesced in its conduct of the business of the agency.

The correspondence between Ryan and the appellant was principally in the name of Wm. Ryan & Co. The letter heads and envelopes used in the corespondnce represented Wm. Ryan and his son, Wm. E. Ryan, as partners. They were so advertised by the appellant, or under its direction, by printing done at its home office. Remittances were sent by letter over the signature of Wm. Ryan & Co., and by the sign of their office and ostensible mode of carrying on the business of the agency, the ordinary evidences of a partnership were held out to the world by them. It is not a satisfactory answer to the printed and other evidence of the existence of the partnership brought home to the appellant to say that the firm name of Wm. Ryan & Co. represented Wm. Ryan alone, that being the style in which he proposed to do business. When such representation is in contravention of the general, reasonable and fair purpose of firm names, and if approved would furnish an easy mode of disproving with comparative impunity the existence of a partnership, although conducted in the usual way, and attended by potent public evidences of that relation. Great force is imparted to the allegation that the partnership really existed, and the appellant knew it by the fact that Ryan, at the beginning of his agency, applied to the company's officers to allow him to admit his son as an ostensible partner, for the purpose of giving him social or commercial consequence.

By that application the appellant was made aware of Ryan's desire to take his son in as a partner, and so soon as he began to conduct the business in a firm name that would naturally embrace his son it was the duty of appellant, having knowledge of it, to take notice of the fact and forbid the use of such partnership indicia, which was calculated to hold Wm. E. Ryan out to the world as a partner, and give him legal control of the assets and business. An ostensible or nominal partner has as much control, and his acts are as binding in the conduct of the business of the partnership, so far as the world is concerned, as a real partner, if he be held out to the world as a real part-

ner. The admission of such a partner is a violation of the contract with the sureties, and a reasonable and proper regard for their interest demanded that the appellant should have prevented the conduct of the business by Ryan & Co., or notified the sureties of their danger.

The appellant agreed in the bond that the business should be conducted by Wm. Ryan alone, and not by him and his son, for whose acts the sureties might not have been willing to bind themselves. The introduction of the son as a real or ostensible partner was a clear violation of the contract, for, as said in London Assurance Corporation v. Bold, 6 Q. B., 514, "engaging for the good conduct of one man, and engaging for the good conduct of two, are essentially different engagements, both in ordinary understanding and legal effect." (6 Ad. & E., 528.) In that case the sureties on precisely such a bond in legal effect, and on the same plea as in this case, were released.

Lord Ellenborough, in Bellairs, &c., v. Ebsworth, 3 Campbell, 52, said: "The defendant was surety for Philip Nott, and not for Mingay, Nott & Co. When the plaintiff entrusted their agency to the new firm the defendant's responsibility was at an end. He by no means undertook for the good conduct of any future partner with whom P. Nott might associate," and adjudged that the sureties were released by the act of the obligee in entrusting the agency to the firm. That case is in accord with Parham Sewing Machine Co. v. Brock, 113 Mass., 194, in which it was held that the introduction of a new person to purchase machines and manage the business with Delano, for whose conduct the sureties had engaged, "was a material change in the conduct of the agency, and the liability of the sureties," the court saying: "While they might be willing to be sureties for Delano, * * * it does not follow that they can be bound, or have consented to be bound, for the acts of any one whom Delano may have taken into partnership." These authorities, which are based on sound principle, sustain the rule that seems to us to be indisputable, that the introduction of the son, Wm. E. Ryan, as a partner, with the consent, acquiescence or knowledge of appellant, and without the consent of the sureties, released them from their obligation for the faithful conduct of Wm. Ryan alone, whose agency and con-

trol of the business was, according to the agreement contained in the bond, to be single and not open to the admission or intrusion of others, for whom the sureties might have refused to become bound. It is true that the appellant appointed Wm. Ryan only as its agent, but that is not the disputed or essential question upon which this decision must turn. The point in issue is whether the appellant, having entered into a contract with the sureties, appointing Wm. Ryan alone as agent, and agreeing that he should conduct the business of the agency, permitted, or submited to, his act of adding a partner in the transaction of the business, whose subsequent conduct was such as to authorize the world to trust him as a partner, and to inform the appellant that he was acting in that capacity.

While Wm. Ryan had the right to appoint clerks and assistants, whose acts and control of the business were his in law, yet he had no right to treat his son as a partner, imparting to him, by holding him out to the world as such through advertisements, letter heads, and firm signature, remittances by checks, and the general methods of performing the business of the agency, equal original authority over the business with himself. It seems that the appellant was aware of two important facts bearing upon the question of its knowledge of the partnership, and the effect it might have upon the obligation of the sureties. It knew of Ryan's desire to take his son in as a partner, and of his use of the firm name, which naturally embraced his son, and it was particular to attempt to protect itself from the consequences of keeping the business on its own books in the name of Wm. Ryan alone. Why? Certainly because it had doubts of the alleged confined meaning of "Wm. Ryan & Co." It must have known or believed that that name did not represent Wm. Rayn alone, as it now contends was the case, and it should have been equally particular as to the rights of the sureties and absolutely prohibited its use and the manner of conducting the business of the agency by Ryan, or notified them thereof, so they could have proceeded to release themselves, denied his right so to act, or consented to his conduct. While they may have done neither, yet not been bound, still this was appellant's course to secure their

consent or acquiescence, without which they could not be held liable for the acts of the partnership.

The fact that Wm. Ryan caused an insurance license to be issued to Wm. Ryan & Co. was another act, public in its nature, and doubtless known by appellant, that tended to place the business under the unlawful control of another, whose good conduct was not insured by the terms of the bond. This fact, therefore, instead of aiding appellant, increases the reasons for believing it had knowledge of the partnership, for the existence of the license in the firm name might have led to the ascertainment of the partnership. We can not doubt, from the facts traced to the appellant, that it knew, or purposely closed its eyes so it could not know, that Ryan was doing the business of the agency with his son as partner. And it will not be allowed to draw a distinction between the knowledge of its president and other officers, who transact the daily business of the company, and knowledge received by its board of directors in official session, for the purpose of escaping the effect of such knowledge. There are two good reasons for disallowing such a distinction in a case like this: First, because information coming to the officers elected by the board and entrusted with the daily transaction of the business of the company, and those who deal with it and which is necessary, or naturally connected with its performance, and which such officers are in duty bound to disclose to the board, must be treated as the information of the board, and binding upon it; second, because if this were not so all advantages would be given the company, in admitting or denying the information which might never find its way to the official session, or its technically official capacity, although its president and other officials might possess the information, and be the only channel through which it could ordinarily be communicated to the board. Notice, therefore, to such agents in the transactions in which they are employed is notice to the company employing them. (Angell and Ames on Corporations, sections 305, 306, 308; Schenck v. Mercer Co. Insurance Co., 24 N. J. L., 447.) From any point of view we are forced to conclude that appellant had notice of the partnership, or the acts of Wm. Ryan, which were sufficient to induce the world to

believe his son was a partner, and to give him that social and commercial consequence which would flow from the joint control of the business.

Had Ryan kept false cr inaccurate accounts, whereby the appellant was prevented from receiving the money collected by him, it would have constituted a breach of the bond. But the manner of keeping the accounts by Ryan did not divert any of the money from the appellant. It enabled him and the appellant to unjustly apply the proceeds of business done after the execution of the bond to the antecedent indebtedness of Ryan & Carpenter, for whom the sureties were never bound, and thus create a deficiency which the sureties ought not to bear. If the accounts were falsely kept the appellant had every reason to know the object. It was the beneficiary. There was a strong motive for it to alow Ryan to pay up the old indebtedness of Rayn and Carpenter, which was not secured, with funds that shoud have been credited on the business for which these sureties were bound, and then turn upon them for the purpose of hoding them responsible for the deficiency thus created, because in that way the sureties would really have to pay the old indebtedness of Ryan & Carpenter, by acounting for a seeming, but substantial defalcaton of their principal. The strictness of the company in urging returns by Ryan, as its agent, and the large amounts, pressed as he was, which he was placing to the credit of Ryan & Carpenter, and leaving the business he was then doing evidently behind, must have convinced the appellant, as it would any reasonable person, that he was diverting the funds for which the sureties were bound to the payment of that old debt of Ryan & Carpenter.

Thus the appellant received every dollar the sureties contracted it should receive. But it claims this right to the entered credits on Ryan & Carpenter's indebtedness because Ryan directed them so to be made, and appropriated his remissions in that way. It is not necessary to discuss his right to make those appropriations, for whether he made them in fact or not, or whether, under the circumstances exhibited by the record, he could have lawfully exercised such a power without the consent of his sureties, and while the appellant had no notice of the indebtedness of Ryan & Carpenter, the sureties are re-

leased, because the admission of the son, Wm. E. Ryan, as a partner for the reasons given above.

But we do not mean to intimate that Ryan had any such right of appropriation in law, even if appellant was free from the imputation that it understod the condition of affairs by the large remittances and credits which Ryan was placing on the past transactions of Ryan & Carpenter, and had the resolution of the appellant company never been adopted by which it was declared that when the agent deposited funds collected by him they could not be checked out to any one else, save the appellant, or withdrawn from the bank without its consent.

In arriving at the conclusion which we have we are consoled by the fact that the release of the sureties inflicts no injury upon the appellant, because it has really received all the money collected by Ryan after they became bound for him, and the sureties will receive, in justice and equity, what they ought to have been credited with from the beginning.

Wherefore the judgment is affirmed.

Bullock & Anderson for appellant.

Brown & Davie, Rusell & Barrett, Young & Trabue and W. O. & J. L. Dodd for appellees.

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## LOUISVILLE & NASHVILLE R. R. CO. v. TURNER.

(Filed February 16, 1884.)

**Computing time—Where before the expiration of the thirty days allowed by law for the filing of a petition for rehearing the time is extended, such extension is to be reckoned not from the day on which it was granted, but from the expiration of the thirty days, and Sundays are to be excluded.**

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Hargis.

The opinion in this case was delivered on the 18th day of December last. On the 19th of January the time for filing a petition for rehearing was extended twenty days, and February 14 the appellant moved for an additional extension of ten days within which to file the petition. The appellee objected to any further extension, because the twenty days' additional time, not excluding Sundays, was out before the motion of the 14th February was made. Counting from the 18th day of

December to the 14th day of February, excluding the former and including the latter, precisely fifty days intervened, deducting the Sundays. According to section 760, Civil Code, from the time allowed by it for filing petitions for rehearing, the Sundays are excluded, and by analogy, pursuing the spirit of that section, in order not to mislead the profession, we are of the opinion, in the absence of any prior rule to the contrary, that all extensions of time for presenting petitions for rehearing, unless otherwise expressed in the order, should be counted from the expiration of the thirty days allowed by law, and that the Sundays should be excluded from the extension of time granted by the court. Such motions, however, must be made while the party has the right by law, or the permission of the court to file a petition for rehearing.

The objection to the extension is overruled, and ten days' further time allowed to appellant for the presentation of its petition.

Wm. Lindsay, I. Caldwell and Porter & Porter for appellants.

E. W. Hines and Rodes & Settle for appellee.

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## MARTIN'S ADM'R v. MARTIN'S HEIRS, &c.

(Filed February 5, 1884.)

**Notice—Dismissing appeal—If an appellant, who has been granted an appeal by the appellate clerk and who files a partial transcript only, fails to file in the office of the clerk of the inferior court his assignment of errors and schedule, and to notify appellee of the filing thereof, his appeal will be dismissed.**

Appeal from Floyd Circuit Court.

Opinion of the court by Chief Justice Hargis.

This was an action to settle the estate of a decedent in pursuance of chapter 3, title 10, Civil Code. The appellant, as required by subsection 2, section 737, Civil Code, presented his assignment of errors to the judge of the circuit court wherein the judgment appealed from was rendered, who, by endorsement on the assignment, ordered the clerk of that court to copy specified parts, but not all, of the record, and the appellant filed in the office of the clerk the assignment and directons of the judge. No notice of the filing thereof was served

on the appellees and returned to said clerk's office, and for that reason they have moved to dismiss the appeal, and their motion must be sustained.

This appeal was granted by the clerk of this court, and acording to subsection 7 of section 737, whenever an appellant to whom an appeal is granted by the clerk of the Court of Appeals chooses to file a transcript of a part only of the record he shall file in the office of the clerk of the inferior court his assignment of errors and schedule similar to that above described, and shall cause notice of the filing thereof to be served on the appellees and returned to said office, as a summons is directed to be served and returned.

While it is true that the apellant must obtain from the judge, in cases of this character, his order directing the clerk what parts of the record to copy, the subsection requiring this to be done does not dispense with the notice to the appellees required by subsection 7, and it has been construed (Tompkins, &c., v. South, &c., Seminary 78 Ky., 72; Murrell, &c. v. McCallister, Id., 78) as intending to prevent the subjection of parties to the payment of unnecesary costs for copying the entire record when not material.

This being the object of requiring the judge to make out the schedule, the subsection requiring him to do it should not be so construed as to go beyond its purpose and give the judge arbitrary power over the subject of appeals from his judgments, which would be the case if no law existed whereby the appellees could have additional parts of the record brought up when material. The judge might be in error in the schedule he orders as to what parts and how much of the record is material, and appellant's construction of the subsections named would force their adversaries to try upon the parts erroneously selected by the judge, no matter how prejudicial to their rights, nor whether they wished to pray a cross appeal or not. If the appellees have no opportunity to complete the material parts of the record, as allowed by subsection 7, a cross appeal might be of little use. Every party has the right to a trial in this court on all the material parts of the record by which the cause was heard in the inferior court, and we must presume that the provisions of the Code were intended to acomplish that end,

and unless a construction which would prevent the enjoyment of that right is authorized by the express letter of the Code, we can not adapt it.

Subsection 7 seems to be a necessary addition to subsection 2, when a part only of the record is filed by the appellant, and by so construing it the appellee will have an opportunity of applying to the judge for an additional schedule, and if the appellee file cross errors the appellant may, in the same way, file an additional schedule. If the judge should refuse to order all the parts of the record material to the isues raised by the assignment of errors, a party prejudiced by his action could, at the hazard of paying costs if mistaken, bring up any part or all of the record whch the judge refused to order. This we believe to be the proper construction of subsections 2 and 7 of section 737, because the language of the latter embraces all schedules described in any part of section 737, above or preceding it, where the appeal is granted by the clerk of the Court of Appeals, and the appellee will have the right to notice, and an opportunity to produce, the material parts of the record, on which the issues sought to be tried were heard.

Motion sustained.

T. R. Brown and A. Duvall for appellant.

W. S. Hoskins and W. Lindsay for appellees.

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## COMMONWEATLH v. OWENSBORO & NASHVILLE R. R. COMPANY.

(Filed January 24, 1884.)

1. State—Recovery from—Where the State institutes an action against a citizen he may rely upon a counterclaim or set-off to defeat recovery, but can not have judgment over against the State in the absence of legislation authorizing such recovery.

2. Taxation—Where the charter of a railroad provides that it shall be exempt from taxation, such exemption is ordinarily a personal privilege; but if the charter also provide that a purchaser of the road shall enjoy all its rights and immunities, in such case the purchaser will hold it exempt from taxation.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

This is an action by the State against the Owensboro &

Nashville Railroad Co. to recover taxes alleged to be due for the years 1881 and 1882. The right of recovery is denied by the railroad company, with the further response that by mistake of law and fact it paid the amount of taxes for the year 1880, and seeks to have it paid back by the State.

There is no legislative authority for the institution of the action by way of set-off or otherwise against the State, and though the appellee is not liable for the taxes due and assessed for the years 1881 and 1882, the court still can not render a judgment in favor of the appellee against the State for the amount of the taxes paid for the year 1880. When the State undertakes to litigate with the citizen the latter may, by way of set-off or counterclaim, make such defense as will defeat the recovery, but is not entitled to a judgment over against the State in the absence of some legislative enactment authorizing the recovery.

The court will consider only the claim for taxes for the years 1881 and 1882, and if the State is not entitled to recover it ends the controversy, and this seems to be conceded by counsel on each side.

The Owensboro & Russellville Railroad Company was incorporated by the general assembly on the 27th of February, 1867, with power to construct a line of road from Owensboro, on the Ohio river, to Russellville, in Logan county, and by certain amendments was authorized to continue the road to the State line. The company became bankrupt, and a sale was ordered under certain bankruptcy proceedings, and the road purchased by the present appellee, the Owensboro & Nashville Railroad Co. The legislature, deeming the construction of the road as of vast importance to the State, and for the purpose of encouraging the construction of this line of transportation, by a provision of its charter exempted it from taxation until its completion. This exemption was no doubt granted for the reason that, in legislative contemplation, the road, until completed, would yield no revenue to the stockholders, and should, therefore, pay none to the State. The appellee was incorporated under an act of March 1, 1876, and for the purpose of completing the line of road contemplated by the legislature under the original charter. This road was purchased under the

deed in bankruptcy by J. G. Barrett and his brother, the decree directing a sale of the road, its appurtenances, rights and privileges, and a new company incorporated, as already stated, in March, 1876.

An amendment to the original charter of the Owensboro & Russellville Railroad Company, approved January 27, 1872, by the fifth section of the amendment provides that "the said Owensboro & Russellville Railroad Company shall be exempt from taxation until completed, and that it shall never be taxed at a valuation beyond its actual cost."

The amendment also provides a mode for the final redemption of the mortgage bonds issued under the authority of the act, and further provides, by the fourth section, that "the persons or corporation becoming the purchaser or lessee of said road, by reason of any sale or leasing to satisfy the demands of bondholders, shall be vested with all, the rights, privileges, franchises, and immunities of the corporation."

The legislature, in providing for the happening of the contingency upon which it might be necessary to sell the road, has said in express terms that the purchaser shall be clothed with all the rights, privileges and immunities of the original corporation. It must be presumed that the purchaser at the decretal sale was informed as to the extent of the privileges conferred by the original charter, and the sale having been made without any restriction in the deed, the purchaser took all the rights, privileges and immunities belonging to the original corporation, and among these privileges and immunities was the exemption from taxation until the road was completed.

Ordinarily the sale of the property and franchises of a railroad corporation under a decree passes the rights and privileges usually pertaining to such corporations, or necessary to their existence, but where there is an immunity from taxation inserted in the grant it has been held to be a mere personal privliege, pertaining alone to the original company, and is not transferable. Such an immunity, as said by Mr. Justice Field, in the case of Morgan v. Louisiana, 3 Otto, 217, "is personal, and incapable of transfer without express statutory directions." In also the case of Evansville, Henderson & Nashville R. R. Co. v. Commonwealth, 9 Bush, 438, in which the

same doctrine is recognized. We find in this case not only legislative authority authorizing the transfer, but as an inducement to the purchaser to make the bid under which they claim it is expressly provided that this immunity from taxation shall follow the road in the hands of those who buy it.

The legislature must have been influenced to make the exemption because of the necessity for the construction of this line of railway across the State, and from the further belief that no profits or income would be derived from the enterprise until its completion. It is not necessary, however, to inquire into the motive influencing the legislature in its action, as we find the purchaser entitled to the immunity by the act authorizing the sale of the road to satisfy the mortgage bonds. Nor is this immunity affected by the general law designating what kinds of property shall be exempt from taxation.

The judgment below is, therefore, affirmed.

P. W. Hardin for appellant.

John & J. W. Rodman and C. S. Grubbs for appellee.

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## FISH v. HUNT.

(Filed January 31, 1884.)

**Homestead—If at the time the debtor moved upon the land and began its improvement he was already indebted, he can not claim a homestead as against such indebtedness.**

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Pryor.

The appellee in this case purchased a small tract of land and erected upon it improvements, in the way of dwelling house, stable, etc., and after he had removed to the premises the appellant had an execution levied upon the land, and sold for the payment of his debt. A deed was made him by the sheriff, and the question now made is, "was the debtor entitled to a homestead?" The facts alleged and not contradicted, but admitted by the decision, are that the debt of the appellee existed prior to the erection of the improvements on the land, and, therefore, by the express provision of the statute the land could

be subjected to its payment. The place had never been occupied as a homestead until the improvements were made.

Section 16 of article 13, chapter 58, is as follows: "The exemption provided for in this chapter shall apply to all persons of any race or color, who are actual, bona fide housekeepers, with a family, of this Commonwealth; but shall not apply to sales under execution, attachment or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land or the erection of improvements." It is plain if the appellee had purchased the land with the improvements upon it that no homestead would exist as against a prior indebtedness, and if so, we can not see why the debtor should be permitted to expend his means in making improvements on land that he had never lived on, or occupied as a homestead, to the injury of creditors, whose claims existed prior to the expenditure, and, therefore, the statute in express terms excludes the right to a homestead, not only when the purchase of the land was made after the creation of the debt, but where the improvements were made after the liability was incurred. There is no exemption "if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements." The language of the statute is susceptible of but one meaning, and a debtor is not allowed to improve his land not occupied as a homestead by an expenditure of his means for that purpose so as to affect existing creditors.

The value of the land purchased, or the improvements placed upon it can not control the construction of the statute. If the land and improvements combined are worth only $1,000, the construction must be the same, the debtor is using means that property belong to his creditors for the purpose of acquiring a homestead for himself and family. The case of Nichols v. Sennitt, 78 Ky., 630, does not establish a different rule, or recognize any other construction of this section of the statute. The first question decided in that case was as to the sufficiency of the petition. It was alleged that at the time of the levy and sale under execution the appellant was a housekeeper in good faith, with a family, and occupying the premises as a homestead, but omitted to allege that the improvements were made prior to the creation of the debt. This court

held the petition good, saying: "Where exceptions to the general provisions of a statute are found in a distinct clause, it is not necessary to allege that the complainant does not come within the exceptions." The statement of facts made a prima facie case, and the burden was on the defendant to show that the plaintiff was not entitled to the exemption made by the statute. The second question was: Must the homestead exist at the time the debt is created or is it sufficient that it exists at the time the attempt is made to subject the property? The inquiry to be made is not when the debtor entered upon or occupied the homestead, for, if such is the construction given the statute, the debtor, although he had purchased the property and made his improvements prior to the creation of the debt, still he is denied the right to a homestead because he was not occupying it when the debt was contracted. If the debtor is in the actual occupancy of the homestead, as said in the case of Nichols v. Sennitt, supra, at the time the attempt is made to subject the land, he is entitled to the exemption, but the right to this exemption can not be asserted if the debt existed prior to the purchase of the land, or the erection of the improvements. Nichols v. Sennitt, supra, decided that occupancy prior to the creation of the debt is not necessary to entitle the debtor to the exemption, and expressly holds that if the land was purchased, or improvements made after the creation of the debt no homestead can be asserted as against the claim of the prior creditor. The other questions raised by the demurrer will not be considered, as, in our opinion, the petition contained a cause of action. Judgment reversed and cause remanded, with direction to overrule the demurrer and for proceedings consistent with the opinion.

Sam. M. Burdett for appellant.

W. O. Bradley, Isaac A. Stewart and J. K. McClary for appellee.

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## KEAN v. TILFORD, &c.

(Filed February 16, 1884.)

1. Joint property—Sale of by court—Where several persons held as tenants in common land which can not be divided without materially impairing its value, any one of the joint owners is entitled to demand a sale by a court of

equity of the entire tract, and this right can not be defeated by one of them conveying away his interest with a clause prohibiting a sale of it. The statutes which prohibit a sale of joint property where the conveyance by which it was acquired forbids a sale apply only to actions by a guardian or committee to sell the interest of the infant or lunatic in joint property.

2. Judgment on original and cross petition—Where a mortgagee sues to enforce his claim on the undivided share of his mortgagor in land and the other joint owners of the land come in with cross petitions against the mortgagor and ask a sale of the entire tract, a judgment directing the sale of the mortgagor's share to pay the mortgage does not preclude the court from afterwards ordering a sale of the entire tract on the cross petition.

3. Civil Code, section 490, subsection 2, which provides that property jointly owned may be sold on petition of any joint owner, applies not only to land held jointly, but also to that held in common or in coparcenary.

4. Section 497, subsection 7, which provides that if one joint owner objects to the sale the entire tract shall not be sold, but his share shall be set apart, does not apply if the property is incapable of division without impairing its value, in such case the whole shall be sold notwithstanding the objection.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The Louisville Hotel and its appurtenances was originally owned by M. Kean, Jas. W. Hening and Joshua F. Speed.

Kean owned one-half, J. W. Henning one-fourth and Joshua F. Speed one-fourth. Kean died leaving a last will, and by virtue of this will and certain equitable proceedings under it his half of the hotel property now belongs to L. R. Kean and his wife, J. Ellen Kean, and Geo. M. Kean. L. R. Kean owns one-eighth, his wife, J. Ellen Kean one-eighth, and G. M. Kean one-fourth of the entire property.

Joshua Speed died, leaving a will by which he disposed of his one-fourth to his widow and to his brothers and sisters. To his widow he devised one-half of his interest, and the other half to his two brothers and sisters. He limited the interest in this property devised to three of his sisters to an estate for life, and at their death their share to go to their brothers and sisters having children.

Philip Speed, a brother of Joshua Speed, died, and by his will devised his estate to his widow, remainder to his chidren, the issue of such as might be dead to take the place of their parents. L. R. Kean had mortgaged his one-fourth of the estate to Tilford and others, and this action was originally insti-

tuted to subject this interest to the mortgage debt. His wife, Ellen Kean, owning one-eighth, or the one-half of her husband's interest, by deed, was made a defendant. She is asking a sale of the entire estate, alleging that it is indivisible, or can not be divided without materially impairing its value, or the value of her interest, it being subject to the mortgage made by her husband. Henning, who owned a one-fourth interest, filed an answer and cross petition against all the parties in interest, asking a sale of the entire property as indivisible.

Geo. M. Kean, the infant defendant who owns a one-fourth of the property under the will of his father, is resisting a sale his of the interest owned by him: First, because it is against his interest; second, the will of M. Kean expressly forbids the sale until he is twenty-eight years of age; and, lastly, maintains that there is no statutory authority for such a proceeding. The court rendering a judgment for the sale of the entire property, the infant defendant, by his guardian, has appealed.

The death of Joshua Speed leaves his interest to pass by his will in the following proportions: To his widow ten-eightieths, one-eightieth to each of his seven brothers and sisters, and one eightieth to each of his three sisters for life, making three eightieths with remainder over.

The death of two of the original owners of this common estate, and the disposition made by them of their property by last will, has created such a multiplicity of interests in the hotel as renders it essential to the interest of all that a sale should be made of the entire property. It is evident that the property can not be divided without materially impairing its value, and equally as manifest that to dispose of such an estate or property by subjecting minute interests in it to sale at different times would result in great loss to those now entitled.

It is not to be presumed that the present owners are in a condition to run the hotel in common or as partners, and if there is no mode of changing the nature of the title through the chancellor, by a sale of the entire property for the benefit of all, the shares must continue to increase in number and decrease in value until the distributive share of each would scarcely pay the owner for looking after it.

Kean, Henning and Speed, holding as tenants in common this property that was indivisible, or that could not be divided without materially impairing its value, might have instituted an action the one against the other, and required a sale of the entire property under the statute, and this being the case the one tenant, by making a disposition of his interest by deed or will to his children, or to a stranger, co-ntaining a clause prohibiting a sale, can not take from his cotenants or joint owners the right to have the property sold if indivisible. Kean can not, by making a grant or devise of his interest, compel Henning and Speed to sacrifice their interests in order that the provisions of his will or grant may be carried out. Article 3 of chapter 63, General Statutes, and subsection 1 of section 492, Civil Code, have reference to sales of infants' real estate on the petition of the guardian or committee, and was not intended to be applied to sales of real estate held jointly when the property so held can not be divided without materially impairing its value, or the value of the plaintiffs' interest therein.

Section 490 of the Civil Code provides that "a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them though the plaintiff or defendant be of unsound mind or an infant: First, if the shares of each owner be less than one hundred dollars; second, if the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiffs' interest therein." A similar provision is found in the General Statutes, and the proceedings are not required to be regulated, as in cases of the sales of infants' real estate. Where a sale is made under section 490 of the Code no bond is required to be executed to the infant before judgment, but his interest shall remain a lien on the land in the manner pointed out by section 497, bearing interest until the infant becomes of age, or until the guardian of the infant execute bond as is required by section 493. This provision of the Code looked to the fact that the infant might be sued by the joint owner, and as the latter would be entitled to a sale if the case was embraced by subsection 2 of section 490, the infant was made secure by retaining a lien on the land sold until his guardian executed a bond entitling him to receive the money.

In this case all the parties in interest are before the court and vested with the title. In the case of Philip Speed's will, he provided that after the death of his wife his property shall be divided between his children, the children of any who may be dead receiving the share of the parent. This was a vested interest. The same provision, in substance, is found in the will of Joshua Speed, by which he devises an interest in his estate to three of his sisters for life, then to the children of his other brothers and sisters. "The present capacity of taking effect in possession if the premises were to become vacant distinguishes a vested from a contingent remainder." (Walters v. Crutcher, 15 B. Monroe, 2.)

All the parties in interest who are sui juris are seeking to have the entire property sold, and the testimony of those who are familiar with the hotel is to the effect that it is not susceptible of division.

It is insisted by counsel for the infant that a unity of interest must exist, and a joint right of possession to authorize a sale of the entire property. That all the unities of interest, title, time and possession creating a joint tenancy at the common law must be found to exist in this case, or the chancellor is without power to adjudge a sale. Such is not the meaning of the Code. A vested estate is all that is necessary or required. Joint tenants, tenants in common and coparceners are entitled to have a division of their real estate, and whether called the one tenancy or the other they have a vested estate, and with such an interest, where the property is not susceptible of division, it may be sold by the decree of the chancellor. Such was the plain purpose of the statute. We are not able to perceive in what manner this case is affected by subsection 7 of section 494. That section provides that "all persons interested in the property must be made parties, and if objection to the sale be made by a defendant having a joint interest his share shall not be sold, but the property may be divided and a sale of the shares of those desiring it may be ordered if such division and sale can be made without materially impairing the value of the property, or of the plaintiffs' interest therein."

Under this provision of the Code it is insisted by counsel that an objection by any one of the joint owners will prevent the sale of his share, regardless of the rights of the other par-

ties in interest. The objection can only prevail, as we construe this provision of the Code, when a division can be had without materially impairing the value of the property, or of the plaintiffs' interest in it. The infant has failed to show, by proof or otherwise, in this case that such a division could have been made, but on the contrary it plainly appears that the property is indivisible, and that a sale is indispensable to the interests of all concerned.

If parties jointly interested in real property can make out a case under the statute requiring the interposition of the chancellor and a sale of the entirety, it seems to us it has been done in the case being considered, and to deny the relief would be to disregard the plain provisions of the statute.

It is urged that two judgments have been rendered in this case, and that the first judgment being final the last judgment is a nullity. The mortgagees were seeking to sell the one-fourth interest owned by Kean and wife for the payment of their mortgage debt, and the chancellor granted that relief, but did not dispose of the cross petition seeking the sale of the entire property. When called on to consider that branch of the case he rendered a judgment selling the entire property. This seems to have satisfied the mortgagees, and by its terms they will realize their money as soon as the judgment on the original petition had been enforced. That judgment did not dispose of the questions made by the cross petition of the joint owners, and the one could not be pleaded in bar of the other. The fact that the mortgagee had obtained his judgment selling the one-fourth did not prevent the joint owners from having the entire property sold.

It is further suggested by the counsel for the infant that the Code of Practice was not intended to confer new rights, but is an act, entitled "An act to regulate practice in civil cases;" that new remedies may be adopted by it, or the practice changed by its provisions, but no rights conferred other than relate to the remedy. If this position is to be considered as sound the General Statutes confer the jurisdiction in express terms, and the only embarrassing questions arising out of the mode of proceedings for the sale of the real estate of those laboring under a disability spring from the Code of Practice.

Section 6 of article 5, chapter 68, General Statutes, provides that "if lands are held by joint tenants, tenants in common or coparceners, and the same are not susceptible of division (to be ascertained by the proof), or that a division would materially impair its value," etc., a sale may be had, etc. So there is nothing in the constitutional question made, conceding the position assumed by counsel to be the correct one. The Code, whether so intended or not, confines the right of sale to cases where the estate is vested and in possession, and provides the remedy where such facts exist. Its provisions have been followed and recognized by this court and the profession as providing the remedy for the sale of joint interests, where the realty can not be divided without impairing its value. The possession of the land by the tenant is the possession of the owners, and with such a possession, coupled with the title, we see no reason why the chancellor has not full power to adjudge a sale where the proof, as in this case, brings it within the provision of the Code. The guardian of the infant may, by application to the chancellor, upon a proper state of case, have the money of the ward reinvested in the hotel property, and while it is not only the province, but the duty, of a court of equity to protect the rights of infants, we know of no rule of law or equity requiring this to be done by sacrificing the rights of all other parties who are interested in the same estate.

Judgment affirmed.

C. B. Seymour for appellant.

Thos. & John Speed for appellees.

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## CARTER COUNTY COURT v. BUTLER.

(Filed February 14, 1884.)

A vendor who retained a lien for purchase money upon land sold to the county as a poorhouse did not waive that lien by suing and obtaining judgment against the sheriff and his sureties upon his county levy bond, the county court having made a levy sufficient to pay off the purchase money. The claim of the vendor is unlike the ordinary allowances made to creditors where the latter must look to the sheriff and his sureties for payment when a levy has been made, and no question of diligence in the prosecution of the action against the sheriff can arise as between the vendor and the county.

Appeal from Carter Circuit Court.

The Carter County Court purchased property to be used as a county "poor house," the vendor retaining a lien on the property for the unpaid purchase money. The county court made a levy sufficient to pay off the balance of the purchase money, and placed said levy in the hands of the sheriff for collection, and afterwards made an order directing said money to be paid over to the vendor, and the sheriff failing to pay it the vendor sued him and his sureties and obtained judgment and return of "no property." The appellee, holding the vendor's claim and lien by assignment, then instituted this action against the county court to enforce the lien. The defendant pleaded that the prosecution of the action against the sheriff and his sureties was a waiver of the lien embraced in the deed, and if not a waiver, that, by failing to prosecute that action with diligence, the plaintiff lost his right to enforce his lien.

Opinion of the court by Judge Pryor.

In this case there is no evidence or pleading presenting a defense to the action. The attempt on the part of the appellee to prosecute his action against the sheriff and his sureties did not release the lien embraced in the deed, and there is no pretense that the money has been paid to the appellee. The proceeding instituted against the sheriff was really for the benefit of the county, as it was the duty of those in charge of the county finances to see that the debt was paid. This claim is unlike the ordinary allowances made to county creditors, where the latter must look to the sheriff and sureties for payment when a levy has been made to pay the debt. Here a contract was made with the county by which the lien was retained, the vendor of the land being unwilling to relinquish his lien until the purchase money was paid. The county is in no better condition than any other vendee of the land would have been, and no question of diligence can arise as between the appellee and the county. He might have dismissed his action at any time against the sheriff, and resorted to his equitable action enforcing the lien, but instead of doing this he prosecuted the action against the sheriff and a part of the sureties until he recovered a judgment and had a return of no property found. That he failed to issue an execution like an ordinary assignee of a chose

in action after his judgment did not affect his lien. He acted for the best interest of the county, and did nothing to release the sheriff and his sureties from responsibility.

The court, therefore, acted properly in subjecting the land to the lien of the appellant, and the judgment is affirmed.

J. D. Jones, R. D. Davis and A. Duvall for appellant.

E. B. Wilhoit for appellee.

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## ANDERSON v. CINCINNATI SOUTHERN RAILWAY.

(Filed February 19, 1884.)

1. Water course—Obstruction—If one obstructs the flow of water in a water course by erecting a dam or reservoir and collecting water therein for use on his own land, he is liable to any riparian owner along the course of the stream injured by such interruption of the water, even though he may have, after building the dam, leased out the land.

2. Riparian owners—Every owner of land on the banks of a stream has a usufruct in the water, but can not diminish or divert the stream except that all water necessary for the use of men and animals may be withdrawn from it by natural or artificial means, but water can not be taken from it for irrigation or such secondary purposes.

3. Grist mills—After leave has been given to one under the statute to establish a grist mill on a water course the owner has a vested right which can not be taken away without just compensation, but this does not impair the right of any riparian owners along the stream to use the water.

4. Water courses—No one can lawfully erect dams or obstructions on a water course which flows by the land of others except to operate a mill, and after leave obtained of the county court as provided by statute.

5. The right conferred by charter on a railroad company to construct and maintain a road does not include the right to build dams across water courses or otherwise obstruct the flow of any running stream.

Appeal from Pulaski Circuit Court.

Opinion of the coutr by Judge Lewis.

Appellant is the owner of a water grist mill erected by him in 1872, on Pittman's creek, under an order of the Pulaski County Court, granting the leave as provided by law in such cases.

Across the same creek, about one mile below its source, and two miles above appellant's mill, appellees, the trustees of the Cincinnati Southern Railway, under charter granted by the General Assembly, subsequently built their road, and at the

same time erected just above the railroad crossing a wooden dam, four feet high, by which a reservoir was formed, from which water was taken to a supply tank to be used in running their trains. But in 1877 or 1878, several years after the completion of their road, they erected in place of the wooden dam one built of stone, laid in cement, fourteen feet high, by which a reservoir was formed covering ten or eleven acres of land purchased by them of the riparian owner.

This action was brought by appellant against appellees for the alleged wrongful and unlawful obstruction and diversion, by reason of the stone dam, of water that hitherto flowed to, and supplied the power for, the operation of his mill, whereby, as he states, he has been injured, and to a great extent deprived of the use and enjoyment of said mill.

For their defense the appellees answer: First, that since July, 1877, the railroad built by them, together with its franchises, appurtenances, etc., including the stone dam and reservoir, had been leased by them to the Cincinnai Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company, and appellees have not, since that time, been in the possesion, or had control of, the dam or reservoir, and are not, therefore, liable for the injury complained of; second, they deny that the flow of water to appellant's mill has, to any extent, been prevented or delayed by the erection of the stone dam. And state that there is no stream of water, having channel or banks, above the point where the dam is located, the reservoir being supplied with water by surface drainage at times of heavy rains; and that if the water which flows above the dam was unobstructed it would not in any way affect appellant's mill, because the quantity during a portion of each year is so small as, even when added to that below, to be insufficient to run the mill, while during the residue of the time the quantity flowing below is sufficient to operate it as fully as if the dam had not been erected.

In our opinion the first defense is not available. The stone dam, which it is alleged by appellant obstructs and diverts the natural and accustomed flow of water to his mill, was erected by appellees as an appurtenance to their road, and being the primary and continuing cause of the injury complained of,

there can be no question of his right to maintain this action against them for whatever damage has been unlawfully caused thereby. How far the lessees of the railroad may be liable, if at all, for taking the water already obstructed by the dam of appellees, and using it in operating their trains, is a question not now presented.

The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity and quality, is now well established. "Every proprietor of lands on the banks of streams has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it is wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land, as an incident to the land, he can not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years (fifteen under our statute), which is evidence of it. This is the clear and settled general doctrine on the subject. All the difficulty that arises consists in its application." (2 Kent's Commentaries, 439.)

"The primary use of water is for natural and domestic purposes, and each proprietor of the land through which it flows may use as much of it as is necessary for those purposes, even if it be entirely consumed in the use; but he is limited, as regards other purposes, to a reasonable and porportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself." (Wadsworth v. Tillotson, 15 Conn., 366: Evans v. Merriwether, 3 Scammon, 492; Arnold v. Foot, 12 Wend., 330; Davis v. Field, 12 Ver., 118; Mayor of Philadelphia v. Commissioners of Spring

Garden, 7 Barr, 348.) Water may, by a riparian owner, be withdrawn from a stream by ordinary means, or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current. But it can not be withdrawn for the purpose of irrigation or for any other secondary and artificial purpose except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use. (Weston v. Alden, 8 Mass., 136. Colburn v. Richards, 13 Mass., 420; Cook v. Hull, 3 Pick., 269; Anthony v. Lapham, 5 Pick., 175; Evans v. Merriwether, supra.)

It has always been the policy in this State to encourage the building of water mills, and being considered of "public use," the exercise by the legislature of the right of eminent domain in favor of them has never been called in question by the courts.

By section 1, chapter 77, which is substantially the same as section 1 of the act of 1797, continued in force by the Revised Statutes, it is provided that "a person owning land on a water course, the bed whereof belongs to him or the Commonwealth, and desiring to build on such land a grist mill, or other mill or manufactory useful to the public, and needing a dam in or across the water course, or the raising of an established dam, or the cutting or enlarging of a canal above or below, may, by petition in writing, filed in the county court of the county in which is situated the principal part of the land asked to be condemned, obtain therefor a writ of ad quod damnum, for the purpose of making the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not."

But by subsequent sections of the same chapter it is provided that such leave shall not be granted if thereby the mansion house of any other than the applicant, or the out houses or any part of the yard, garden or orchard thereto belonging will be overflowed or taken, or that any other legally established mill will be materially injured thereby, or that the health of the neighbors will be injured. And that no person shall, by reason of such leave, draw the water from the mill pond of another existing at the time of the leave, or otherwise do anything injurious to a vested right in any waterworks then existing on the water course.

By virtue of the leave thus granted to erect a mill or manufactory on a water course in this State the owner acquires a vested right which can not be lawfully infringed by any other person or corporation, or taken or applied to public use without just compensation being previously made. But it was not intended by the legislature that the mill or manufacturing privilege should impair the right of riparian owners, either above or below, to the use of water as it flows by their lands for natural or domestic purposes, nor, perhaps, for secondary and artificial purposes, when applied in such a way as not to materially interfere with its general use, or with vested rights. Yet in view of the restrictions attached to the grant of mill and manufacturing privileges, which can be enjoyed only by riparian owners, and the care with which the rights and convenience, of others are guarded by the statute, it would seem that, according to its spirit, if not its letter, no one, except for the purpose of operating a mill or manufactory, and without first obtaining the leave of a county court, has the right to erect a dam or other obstruction on a water course which flows by the lands of others. It follows, therefore, that unless the privilege of building the dam complained of has been conferred upon appellees by their charter its erection must be held illegal.

They exist as a quasi corporation, and possess only such rights, privileges and franchises as are expressly conferred by the act of incorporation. For the purpose of constructing and maintaining their line of railway and its appendages they are empowered to acquire the necessary land and take from proprietors the right of way, which may include stone, timber, earth and gravel, compensation therefor being first made in the manner provided in the act. By section 18 the phrase "line of railway and its appendages" is made to extend to and include the works of conveniences of said railway, such as offices, stations, shops, sheds, depots, car houses and other buildings, bridges, viaducts, tunnels, arches, piers, abutments, embankments approaches, ways, aqueducts, culverts, sewers, drains, etc. But there is no power conferred upon them to build dams across water courses upon which mills or manufactories have been or may be established according to law, or to otherwise

obstruct the natural flow of any running stream. Nor is the exercise of such right a necessary incident of their power to construct and maintain their railway.

It would be unreasonable and against the settled policy of the law of this State to extend the charter of appellees, in the absence of an express grant, so as to confer upon them by implication the unqualified right, not possesed by natural persons, to obstruct water courses without any regard to the vested rights of mill or riparian proprietors, and without previous compensation to them being provided for in their charter. And that it was not intended to give to appellees the right to such dams across water courses flowing by the lands of other persons appears manifest from the failure of the legislature to make adequate provision in their charter or elsewhere for determining the value of land taken or damages done, and requiring previous compensation to be made therefor.

The court below, assuming that appellees had the power to purchase and hold the land covered by the water of the reservoir, and as owners thereof the right to the use of the water flowing over their land for the purpose of furnishing their locomotive engines with water at that point, and for other purposes connected with the operation of their road, instructed the jury that they had the right to such a dam, and that appellant can not recover on that account unless appellees have made an unreasonable use of the water and to his injury, or diverted or shipped off or wasted it beyond the necessities of their railroads at that point. Without deciding whether appellees have the power under their charter to purchase and hold land used for such purposes, or whether, if they have, they are to be regarded as riparian proprietors, having the common law rights as such, we are of the opinion the instruction is erroneous because, first, appellees, as before intimated, had no right to erect the dam so as to stop or impede the natural and accustomed flow of water; second, the quantity needed by appellees for the purposes mentioned in the instruction is not the proper and unvarying test of what is a reasonable use, for what would, in the case of a large stream, be reasonable use might, in the case of a small stream, amount to almost an

exclusion of those below from participation in the use of the water.

But the gravamen of this action is the erection of the dam across the stream, and the only questions arising are whether the natural and accustomed flow of water to appellant's mill has thereby been obstructed at all, and if so, to what extent appellant has been thereby damaged between the time of its erection and the commencement of the action.

If the dam has, to any extent, so obstructed or diverted the water, the erection of it by appellees was an unlawful invasion of appellant's vested right, which is put at hazard, and may be lost by acquiescence, and he is, therefore, entitled to at least nominal damages, and may also recover substantial damages for any material and perceptible injury done to his mill by reason of the dam.

The judgment is reversed and cause remanded, with instructions for a new trial and further proceedings consistent with this opinion.

Curd & Waddle for appellant.

Morrow & Newell for appellee.

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## KENTUCKY SUPERIOR COURT.

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## HART'S ASS'EE v. DIXON.

(Filed October 17, 1883.)

**Assignment—A creditor may assign a part of a debt due to him and thereby vest the assignee with the right to sue and recover of the debtor even without the debtor's consent to the assignment; but the order of assignment must not be drawn in general terms (like a bill of exchange), merely directing the payment of the money; it must state the particular debt out of which it is to be paid.**

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Bowden.

This appeal involves the legal effect of the following writing:

"Lime Creek, Mo., Nov. 9, 1872.

"$350. On the first day of January after date, pay to the order of Claude L. Berry three hundred and fifty dollars, value received, and charge to account of

"J. T. BERRY,
"SUSAN M. BERRY.

"To Miss Bush Hopkins, Henderson, Ky."

This writing, which is in form a bill of exchange, was endorsed by Claude L. Berry to J. B. Hart.

In May, 1875, Geo. L. Dixon sued the administrator of Miss Bush Hopkins to recover judgment on a note dated October 8, 1869, due January 1, 1875, for $8,400, with interest from date, payable annually, which note Miss Bush had executed to P. Thompson, which Thompson had, January 20, 1870, assigned to Susan M. Berry, wife of J. T. Berry, and which they had assigned to Dixon January 25, 1875. Several payments had been made and credited. Having taken a personal judgment, Dixon amended his petition, making the heirs of Miss Hopkins defendants, and seeking to enforce a vendor's lien, the note having been given for purchase money for land conveyed by Thompson to Miss Hopkins. Pending that action John B. Hart filed his petition to be made a party, and his petition was taken as his answer and cross petition against J. F. Berry, Susan M. Berry, Geo. L. Dixon and the administrator of Miss Hopkins. He alleges the execution and transfer of the writing of November 9, 1872. He says that it was given to Claude L. Berry "long before the assignment of said debt to the defendant, Dixon, and was intended as an assignment of that much of the indebtedness of Miss Hopkins to defendant Berry; that on the 9th day of November, 1872, Miss Bush Hopkins was largely indebted to J. T. Berry and his wife, Susan M. Berry; that defendant Dixon knew all these facts, and knew of the assignment of said $350 of said debt" before and when the note was assigned to him.

In June, 1878, Dixon filed an answer, to which there seems to have been no reply. November 17, 1881, his answer not having been withdrawn, he filed a general demurrer, which was sustained, and Hart's cross petition was dismissed, not only as against Dixon, but as against all the others. The record

shows that when the demurrer was sustained Ward, the assignee of Hart, who had been substituted, declined to plead further, and then prayed an appeal, which was granted. The next day Ward entered a motion "to set aside and vacate so much of the order as sustained plaintiff's demurrer and dismissed the petition absolutely," but upon what ground does not appear. That motion was overruled. He then tendered an amended petition, which he was not permitted to file. It does not seem that while the order granting an appeal remained in force any amended pleadings should have been permitted. The amendment rejected is not part of the record, and for that reason we can not say the court should have allowed it to be filed. We presume that the motion to set aside the order sustaining the demurrer and dismissing the petition was designed merely as a means of getting in the amendment offered.

Did the court err in sustaining the demurrer? Unless the writing of November 9, 1872, operated as an assignment of a part of the indebtedness from Hopkins to the Berrys, Hart had no cause of action against the administrator of Hopkins, who refused to accept the "order," and had no right to intervene on Dixon's action, either to exclude Dixon from his lien, or to limit the amount of his recovery, as he might have done if he had been a general creditor and the estate had been insolvent, since in that case the real contest would have been among creditors over a limited fund, and the general creditor could resist Dixon's alleged lien, as well as show that the debt had been paid partly or entirely.

The writing is in form a bill of exchange, drawn by the Berrys in Missouri on Miss Hopkins in Kentucky. It does not purport to be an order on her to pay Claude L. Berry a certain part of a designated fund. It does not purport to assign to Claude any part of any debt, nor does Hart allege that the Berrys did in point of fact make any such assignment. His allegation is that "the order was intended as an assignment."

While it can not be doubted that a creditor may, by writing or parol, assign a part of the debt so as to enable the assignee to recover it by force of that assignment, and independent of his debtor's consent, it seems also clear that a negotiable bill for a part of the fund is not an assignment before acceptance. (Man-

deville v. Welch, 5 Wheat., 277; Tiernan v. Jackson, 5 Pet., 580; Winter v. Drury, 5 N. Y., 525; Harris v. Clark, 3 Comst., 93; Cowperthwaite v. Sheffield, Ib., 243; Jones v. Pacific Wood Co., 18 Nev., 359; Hutter v. Ellwanger, 4 Lansing, 11; Brill v. Tuttle, 15 Hun., 289.) It was held in these cases, and it is a well-established rule, that in order to constitute an equitable assignment of part of a debt it is necessary that the order should be drawn not generally, but upon the particular fund a part of which is intended to be assigned. While the language of section 1044, Story's Equity Jurisprudence, to which we are referred by appellant, has been the subject of judicial criticism, it seems that it hardly admits an interpretation as meaning that in equity a bill of exchange—an order payable generally and absolutely—could operate as an assignment of a part of a debt which the drawee owed the drawer; especially when it is considered that he cites as authority the cases of Mandeville v. Welch and Tiernan v. Jackson, supra, in both of which cases he delivered the opinion of the court, and both of which expressly deny such effect to a bill of exchange. He says that "if A, having a debt due him from B, order it to be paid to C," and that "the same principle would apply to the case of an assignment of a part of such debt." In Newby v. Hill, 2 Met., 580, the entire debt was assigned, and that particular debt was designated.

The order given to Claude L. Berry was a bill of exchange. It created no lien on the fund which Miss Hopkins owed; it imposed no obligation on her; it left her entirely free to pay the whole of it to the drawers, or to Dixon, their assignee.

But it is contended that her right to refuse to accept was personal, and that as Dixon took the note with knowledge that the order had been given to Claude, and that "it was intended as an assignment," he could not acquire from the Berrys a right superior to that of the holder of the outstanding bill. It may be remarked that the order itself does not purport to be drawn on the particular fund represented by the note which the Berrys held as assignee of Thompson, and that it is not alleged in Hart's petition that any part of that fund was assigned, or that it was "intended to assign" any part of that fund; and consequently it is not alleged that Dixon had notice that any part of that fund "was intended" to be assigned. The only

notice which the petition alleges is that Dixon knew that the Berrys had drawn in favor of Claude, on Miss Hopkins, a bill of exchange for $350, and that "it was intended as an assignment of that much of the indebtedness of Miss Hopkins," who at that time "was largely indebted to J. T. Berry and his wife, Susan M. Berry." Certainly this does not charge that the bill "was intended" as an assignment of any part of the debt evidenced by the note afterwards assigned to Dixon, and, therefore, does not charge Dixon with notice of any assignment, actual or intended. But even if it were conceded that Dixon knew that the Berrys gave the bill, intending at the time that it should have the effect of an assignment, and operate as a lien on that much of the debt evidenced by the note they then held, he could not be affected by such notice beyond the legal value facts known. The difficulty in apellant's way is that the bill of exchange did not of itself create any lien, or prevent the drawers from collecting next day the entire amount which Miss Hopkins may have owed, if it had been due, nor, consequently, did it prevent them from transferring the entire debt to another person; the debt remains theirs; the bill gave to Claude no interest in it or lien upon it. Doubtless on the failure of the drawee to accept and pay he had recourse on the drawers, but it will not be claimed that this right could operate as a limitation on their power to transfer to Dixon the note on Miss Hopkins, or that Dixon's knowledge that the Berrys were liable generally as drawers on account of the nonpayment of the bill would affect his title to a note which they sold to him for value.

Nor, were it relevant, would we admit that a bill of exchange —an order payable generally and absolutely—can be converted into an order drawn on a particular fund for a part of it by evidence that such was the intention of both drawer and payee, and thus change the legal quality of the instrument from a mere request to pay money into an actual appropriation of a fund. In Luff v. Pope, 5 Hill, 413, an attempt was made to recover against the drawee of a bill of exchange without acceptance, on the ground that the bill was intended as an order on a special fund. The court said "that a written instrument which is perfectly plain and explicit on its face can not be changed into something else by an inquiry into extrinsic facts. It must

speak for itself." This was approved in Harris v. Clarke, and in Jones v. Pacific Wood Co., supra, where the language of Hutter v. Ellwanger, supra, was quoted with approval, that it is "perfectly settled that in order to constitute an assignment the order must specify the particular fund upon which it is drawn." Cowperthwaite v. Sheffield and Tiernan v. Jackson, supra, go on the same ground.

We are of the opinion that Hart had no claim against Miss Hopkins' administrator, and, therefore, no right to contest the disposition of the assets; that he had no claim against Dixon, and had no right to intervene in his effort to collect the amount of the note which the Berrys had assigned to him.

The judgment is affirmed.

H. F. Turner for appellant.

S. B. & R. D. Vance for appellee.

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## COMMONWEATLH v. McGRORTY.

(Filed January 30, 1884.)

**Liquor license—A druggist may sell spirituous liquor by the half pint, although he has no license, provided he has a physician's prescription therefor.**

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Richards.

The only question raised by the appeal is whether a druggist can sell spirituous liquor by the half pint, without a license, in the absence of a physician's prescription.

Article 2, chapter 106, of the General Statutes provides for the licensing of a merchant to sell in quantities of not less than a quart, to be taken off and drunk elsewhere than on his premises, or adjacent thereto. By section 5, article 8, chapter 92, it is provided that "any tavern keeper or merchant who shall sell spirituous liquors without having obtained a license therefor, shall, on conviction, pay sixty dollars." So if a druggist is embraced by the term "merchant" in the latter statute, even a license under the former would be no protection for the appellee in this case, who sold in quantities of less than a quart.

It was said in Cole v. Commonwealth, 8 Dana, 81, that "a merchant is one who traffics by way of buying and selling, or

bartering of goods or any merchandise." It was proved that the appellee was engaged in selling drugs, medicines, tobacco, cigars, oils, paints, glass and other light articles. It is evident, therefore, that McGrorty was a merchant in the sense generally given to that expression. But in Anderson v. Commonwealth, 9 Bush, 570, the Court of Appeals held that the legislature did not intend to include druggists who sold upon the prescriptions of physicians. The court said: "That statute declares that 'any merchant who shall sell spirituous liquors, without having obtained a license therefor, shall, on conviction, pay sixty dollars." And the court, in view of it, instructed the jury, in effect, that "if the defendants sold whisky at their drug store, in quantities less than a quart, and that they were merchants, the jury must find them guilty, and the fact that the whisky was sold for medicinal purposes alone, and upon the prescriptions of physicians, constituted no defense to the indictments," which instructions they proceeded to decide erroneous.

So in Hainline v. Commonwealth, 13 Bush, 352, it was held that the defendant should be convicted on proof that "he sold liquor in quantities less than a quart to a person who applied to him with a prescription of a regular physician; that the purchases were made in good faith, and that the whisky so sold was used for medicinal purposes."

But in Maupin v. Commonwealth, 1 Ky. Law Rep., 281, where the appellant had been convicted under the same statute, the court, in affirming the judgment, said: "It was immaterial whether the jury should find that appellant was a druggist, as no proof was offered to show that the liquor was sold in good faith for medicinal purposes on the prescription of a physician. The offer to prove that a physician orally recommended whisky and polk root for rheumatism without giving a written prescription, without prescribing the quantity, and without proof that appellant was suffering from the disease, was properly rejected by the court, as the fact would have been no evidence that the whisky was furnished in good faith for medicinal purposes on the prescription."

And we find no modification of the doctrine announced in the latter case, except in Commonwealth v. Matthews, 3 Ky. Law Rep., 473, where it was held that the prescription need not

be in writing, the accused being both the physician and the druggist, but it was a sufficient defense to prove that the defendant "was a regular practicing physician, kept the drug store himself, and prescribed the whisky as medicine in good faith."

We find, therefore, that although a literal interpretation of the language of the act would forbid a druggist from selling liquor without a license, still that the Court of Appeals have held that the legislature could never have intended to embrace druggists who sold in good faith for medicinal purposes, upon the prescriptions of physicians, although a sale without such prescription would be a violation of the act.

We presume that the reasoning which led to the decision that the legislature intended to forbid even druggists to sell without a prescription was based to some extent upon legislative declarations in other statutes regarding the traffic in liquor. For instance, in 1874 what is properly known as the local option law was passed, and made to apply to all druggists, except those "who sell for medicinal purposes on a prescription made and signed by a regular practicing physician." In 1880 this act was supplemented by one which made it unlawful for any druggist to sell liquors in any county, town, district or place in which their retail was forbidden by law, unless he had first obtained license, and even such license was to be no protection except from sales made "upon the prescription of a regular practicing physician, plainly written or printed and dated, and signed by such physician." (General Statutes, 920-1.) Many local acts contain similar provisions.

Wherever the legislative intent to exempt druggists from statutes prohibiting the retail of liquors has been expressly declared we find such exemptions limited to sale upon the prescription of physicians. We must, therefore, conclude in construing the statute before us, where there is no express declaration on the subject, that the same legislative intent prevailed in its enactment.

For the hardships of the law we are not responsibe. Much, however; might be said in support of the distinction which the legislature seems to have made between sales with and without prescriptions, the lower court in its instructions having alto-

gether disregarded this distinction. The judgment is reversed and the cause remanded for further proceedings.

R. C. Warren for appellant.

Durham & Jacobs for appellee.

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## NOTES.

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A farmer in New Hampshire recently forwarded a letter to a neighboring town, requesting the postmaster to deliver it "to any respectable attorney." After ten days it was returned with the significant endorsement, "none here."

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Lamb once told a friend that Coleridge had said that Shakespeare was greatly overrated, and owed much of his popularity and success to a mere trick in his style, and that he, Coleridge, could write just as well in that style, "if he had a mind to." "So you see," said Lamb, in his quiet way, "after all it was only the mind that was wanting."

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Undoubtedy the most troublesome question to regulate in criminal law is that of insanity as a defense in murder cases. To prevent it from being used as a mask by those who would escape the just punishment of their evil deeds, and yet not to withhold it as a defense from those who have acted without responsible intelligence is a difficult problem, and one which instances occurring daily of the perversion of the plea, loudly call on the profession and the legislature to deal with. The Supreme Court of Louisiana has declared that a defendant acquitted on the ground of insanity should be confined in an asylum for as long a period as he would have been imprisoned had he been found guilty. (State v. DeRance.) This rule, or something better, should be adopted in this State.

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The heat of the controversy in New York between the codifiers and the devotees of the common law has at last become so great that it has enlisted the attention of the laity, and the

New York Tribune has undertaken to get the opinion of the bar generally on the question, by sending out postal cards all over the State, requesting answers to the following questions: 1. Are you in favor of codification of the common law? 2. Are you in favor of the proposed Field Civil Code? 3. Why? The answers received show a majority in favor of a Code. The judges are especially pronounced against it, while the younger leaders of the bar are favorable to it, upon the idea, as suggested by the Tribune, that a new body of laws which all must learn, young and old alike, would materially reduce the advantage which the older members of the profession now enjoy. The answers show great warmth of expression, as well as divergence of views. One response declares that the Code is a most excellent statement of the general principles of law, and another pronounces it "utter nonsense." Besides this one of codification, there has been another question much discussed in New York during the last two months as to whether the judges of the Court of Appeas should wear robes. There was much said pro and con, but the matter was finally settled the other day by their Honors appearing each with the flowing vestment falling from his shoulders. Much indignation is expresed, and some go so far as to predict disaster and ruin to the whole bench if such an undemocratic practice is generally adopted. The Albany Law Journal has been particuarly ardent in advocating the robes, the Central Law Journal, Chicago Legal News opposing them. We are heartily glad the matter is at last settled. It has appropriated a lion's share of attention in these journals for some time past, and has been discussed with more warmth than wisdom. Two of the U. S. Circuit judgeships will soon be vacant. Judge McCrary, of Iowa, has already resigned his place to accept the attorneyship of a great railroad, and Judge Lowell, of Massachusetts, has sent in his resignation to take effect in May. He has been on the bench 19 years.

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Sir John Byles, the author of that familar volume, Byles on Bills, and for 15 years a judge of the English Court of Common Pleas, is dead, aged 83. The following amusing review of his life, taken from the London Law Journal, will be found interesting reading:

The career of Sir John Byles was that of a most successful advocate at the bar, and a very learned lawyer as barrister and judge in one branch of legal study. "Byles on Bills," for accuracy and clearness is among the best law books in the English language. Lawyers and judges have for years turned to it for information with absolute confidence. It is not too much to say that without it the codification of the law of bills of exchange would have been impossible. Sir John was thirty years of age before he was called to the bar, and up to that he had been in business. His business experiences, perhaps, suggested to him the production of a book on one of the most important branches of commercial law. The success of the book still further determined the bent of his legal studies and practice. He became a good commercial lawyer, but he never gained any great reputation in other branches of the law. His mind wanted that breadth and clearsightedness which are essential to the intellectual equipment of a great lawyer, who is to lay down propositions of universal application. He will always be known as Byles on Bills, a result to which the "artful aid" of alliteration conduces. Many are the stories told of Sir John Byles when at the bar and on the bench. His horse figures in several of them. When he was at the bar he had a horse, or rather a pony, which used to arrive at King's Bench Walk every afternoon at three o'clock. Whatever his engagements Mr. Byles would manage, by hook or by crook, to take a ride, generally to the Regent's Park and back, on this animal, the sorry apearance of which was the amusement of the Temple. This horse, it is said, was sometimes called "Bill" to give opportunity for the combination "there goes Byles on Bills;" but if tradition is to be believed this was not the name by which its master knew it. He, or he and his clerk between them, called the horse "Business," and when a too curious client asked where the sergeant was the clerk answered with a clear conscience that he was "out on Business." When on the bench Mr. Justice Byles' taste in horseflesh does not seem to have improved. It is related of him that in an argument upon section 17 of the Statute of Frauds he put to the counsel arguing a case, by way of illustration: "Suppose, Mr. So and So," he said, "that I were to agree to sell you my horse,

do you mean to say that I could not recover the price unless," and so on. The illustration was so pointed that there was no way out of it but to say, "My lord, the section applies only to things of the value of 10£," a retort which all who had ever seen the horse appreciated. Instances of his astuteness in advocacy were numerous. His mode of winning cases was not by carrying juries with him by a storm of eloquence, or cross-examining witnesses out of court, but by discovering the weak point in his adversary's case and tripping him up, or by the nice conduct of such resources as his own case possessed. On one occasion he was retained for the defendant with Mr., afterward Mr. Justice, Wiles, whom he led at the bar, but who was afterward his senior in the Court of Common Pleas, in a case of some complication tried before Chief Justice Jervis. At the end of the day, Saturday, Mr. Byles submited that there was no case, and the judge rose to give his decision next week. In the interval Wiles asked Byles why he did not take a particular point which both had agreed in consultation to be fatal to the plaintiff's case. "I left that to the chief justice," said Byles; I led up to it and walked round it, so that he can not miss it, but if I had taken it he would have decided against us at once." And so it proved, for on Monday morning the chief justice gave an elaborate judgment overruling all the points taken, but nonsuiting the plaintiff on a ground which he said he was astonished to find had not been taken by either of the very learned counsel for the defendant, but which, in his opinion, was conclusive.

The following anecdote is also floating around: "A learned counsel on one occasion was pleading a cause before Sir John Byles, and made a quotation from a work, 'which,' said he, 'I hold in my hand, and is commonly called "Byles on Bills."' Sir John Byles: "Does the learned author give any authority for that statement?" Counsel, referring to the work: "No, my lord, I can not find that he does." Sir John Byles: "Ah! then do not trust him; I know him well."

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Lord Houghton once heard a lady boasting that when she was young she had had twenty lovers at her feet at one time. "Chiropodislo," said his lordship in an undertone to a friend.

There is a tradition of a Cunard captain of years ago who, in his off days, prided himself on his curt replies to inquiries. A lady on his ship asked him a civil question one day when he was especially cross. "Don't trouble me, ma'am," was the response, "go ask the cook; perhaps he'll tell you." "Excuse me, she said, instantly, "I supposed you were the cook when I addressed you." The captain was polite all the rest of the trip.

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Here is another of the many reminiscences that are going the rounds of the press concerning Sojourner Truth. At one time during the war she was in Washington, and called on President Lincoln, and gave him her photograph, saying, "the face is black, but it has a white back to it. Will you please give me the picture of your face with a greenback to it?" Lincoln smilingly handed her a ten dollar greenback, the vignette of which was the picture of his face.

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We have received a work on American Law by Dr. Wharton, but regret that it came to hand too late to receive further notice in this number.

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full—Alphabetically arranged according to their subject-matters.**

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Actions—

1. Set-off—A judgment at law does not affect the right of the defendant to recover on a claim which was not, although it might have been, pleaded as a set-off or counterclaim in the action. City National Bank, &c. v. Gardner, &c. Paxton, &c. v. City National Bank, &c. February 5, 1884. McCracken Ct. Com. Pleas. Opin. by Lewis, J., Ct. of Ap., rev. Bigger & Reid and Gilbert & Reid for appellants; Sam Houston and W. T. Bullitt for appellees, Gardner, &c.
2. In a suit by State against a citizen, the latter may rely on a counterclaim or set-off, but can not have judgment over against the State. Commonwealth v. Owensboro, &c., R. R. Co., ante, 650.

Appeals—

1. Notice must be given of filing of assignment of errors and schedule. Martin's adm'r v. Martin's heirs, ante, 648.
2. An action by a creditor to have a transfer of property by his debtor declared to operate as an assignment for the benefit of creditors, where the debtor owns a freehold estate, involves the title to a freehold, and the Court of Appeals has jurisdiction of an appeal from a judgment granting or denying the relief sought. The transfer, if a fraudulent preference, has the same effect as a deed of assignment of all the debtor's property for the benefit of creditors under the operation of the law providing that it shall have no effect unless claim be made under it within six months. Atkinson, &c. v. Reiley. February 13, 1884. Washington Cir. Ct. Opin. by Bowden. J., Sup. Ct., transferring to Ct. Ap. P. B. Thompson for appellants; W. E. Riley for appellee.
3. Motion for new trial—Although the record shows that the appellant filed writtten grounds and moved for a new trial, it does not disclose what those grounds were. The court can not consider anything except the sufficiency of the pleadings and verdict to support the judgment. May v. Deposit Bank, &c. February 20, 1884. McLean Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Cook & Givens for appellant; Sweeney & Sons and Weir, Weir & Walker for appellees.

3. Partial transcript—The appellant having filed only a partial transcript of the record upon an appeal granted by the clerk of the Court of Appeals, without complying with the requirements of subsection 7 of section 787, Civil Code, the appeal is dismissed. Gilmore, Kite & Co. v. Stone, &c. February 13, 1884. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. H. Beauchamp and G. N. Robinson for appellants; Thomas J. Barker for appellees.
5. Final order—An order discharging an attachment made at the time judgment is rendered is final, and the attachment can not be reinstated as provided by section 270 of the Code
6. Suspends power of lower court over judgment—After an appeal has been granted the lower court has no power to set aside or modify the judgment appealed from. Davidson v. Allan, &c February 6, 1884. Lou. Ch'y Ct. Opin. by Reid, P. J., Sup. Ct., rev. Kohn & Barker for appellant; Buford Twyman for appellees.
7. No appeal can be prosecuted from a verdict upon which no judgment has been rendered. Thacker v. Crawford, &c. February 12, 1884. Lee Cir. Ct. Opin. by Pryor, J., Ct. Ap., dis. H. C. Lilly & Sons for appellant; John L. Scott for appellees.

Appeals to Circuit Court—

Upon appeal to the circuit court the action stands as if brought there and is tried anew, and the adverse parties must be summoned to answer. An endorsement by attorneys upon the appeal bond that one of the parties entered his appearance did not make him a party to the appeal. Wills v. McKee. February 20, 1884. Mercer Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. W. H. Holt for appellant; John Jay Cornelison for appellee.

Apprentice—

1. To entitle the apprentice to recover the $100 which the statute provides the master shall be bound to pay him at the termination of the apprenticeship, unless the master has taught him to read and write, it is not necessary to incorporate in the articles of apprenticeship any stipulation as to the payment of the $100.
2. A mistake in the recitals of the bond as to the age of the apprentice does not conclude him as to his true age, and if, when he in fact reaches the age of twenty-one, the master has not taught him to read and write, he is entitled to recover the $100. Sayers v. Downs. February 6, 1884. Nelson Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. J. W. Thomas for appellant; J. H. Wathen for appellee.

Assignment—

A creditor may assign part of a debt due him; but the order of assignment must not be drawn in general terms, it must state the particular debt out of which it is to be paid. Hart's Ass'ee v. Dixon, ante, 669.

Assignment for Benefit of Creditors—

Suit on assignee's bond—In cases of voluntary assignments the trustee and his sureties can not be sued on his bond by a creditor until there has been a suit in equity for the settlement of the trust, and it has been

ascertained to what part of the trust fund the creditor is entitled. Yarbrough, &c. v. Colley. February 20, 1884. Graves Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Boone & Stanfield, John A. Mayes and E. W. Hines for appellants; Robertson & Robbins and H. J. Moorman for appellee.

Attachment—See Appeals, 5—

Discharge—The attachment in this case was properly discharged, because it was not granted by the court in which the action was pending, or by any circuit judge, or by the presiding judge of the county court, and no bond appears to have been executed. Worthington v. Damarin & Co., &c. February 6, 1884. Greenup Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. E. F. Dulin for appellant; L. T. Moore and B. F. Bennett for appellees.

Attorney—

Contract against public policy—Public policy forbids, and the law will not countenance, a combination by which the defendant's attorney can reap any benefit from a contract with the plaintiff by which the latter's creditors are fraudulently deprived of the lien they have acquired under an attachment of their debtor's interest in the claim sued upon. Howard v. Cornelison. February 27, 1884. Montgomery Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. A. T. Wood and W. H. Holt for appellant; H. L. Stone for appellee,

Bills of Exceptions—

Time of filing—A motion for a new trial having been overruled July 2, 1881, a bill of exceptions filed December 17, 1881, can not be considered, although the time for completing the bill was extended from time to time, until it was filed. The appellee can not thus be kept in court looking for the filing of the bill unless by his consent, which does not appear in this case. Byers' Adm'r v. Louisville, &c., Mail Line Co. February 19, 1884. Jeff. Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. C. Trabue and J. H. Trabue for appellant; H. Pope and W. S. Hogue for appellee.

Contracts—

Construction—Upon the margin of a recorded lease was a writing, signed by the parties, to the effect that the lease had been canceled by the lessor "giving up and surrendering" the lessee's notes except one, describing it.

Held—That this could not have been intended to include one of the notes which, having passed by assignment from under the control of the lessor, was not delivered, as the writing refers to the delivery of the notes as an accomplished fact and not to a promise to deliver. Petway's Adm'r v. Reno. February 20, 1884. McCracken Ct. Com. Pleas. Opin. by Rchards, J., Sup. Ct., rev. Gilbert & Reid for appellant; W. R. Newell for appellee.

Conveyances—

Construction—Life estate—Under a grant to M,, "her heirs and assigns forever during her life," to have and to hold the same to M, and her heirs and assigns forever, M, and her heirs take only a life estate, which is all that is granted, Moss v. Hunter, &c. February 21, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. J. R. Botts, R. D, Handy and F. T. Towers for appellant; D. A. Glenn for appellees.

Corporation—See Mandamus—

1. Not bound by legislative amendment to its charter which it has refused to accept. Orr v. Bracken Co., &c., ante, 632.
2. Is affected by facts known to its president or other officer doing its daily business, Conn. Mut. Life Ins. Co. v. Scott, &c., ante, 639.
3. Contracts—Consideration—First—Appellants contracted with appellee to construct a pier for its bridge for a certain price according to certain specifications and plans, according to which the pier was to rest on bed-rock twelve feet below the bed of the river, the contract providing that all excavation below the depth designated in the plan should be done at a certain price per cubic yard. The original petition of appellants was based upon this contract. They filed several amendments, alleging fraud and mistake in the execution of the contract and offered an amendment, alleging that when they had reached the depth of fifteen feet below the surface of the water, not finding bed-rock, they refused to proceed further unless the defendant would agree to pay them what the work below that point was reasonably worth, which they claimed was the real contract, and that as a compromise of the controversy the board of directors agreed that if the plaintiffs would proceed with the execution of the work to its completion, they would pay the reasonable worth of the excavation below the depth of fifteen feet.

   Held—That the court should have permitted the amendment, and an issue upon it. The controversy existing between the parties as to what should have been embraced by the terms of the written contract, was a sufficient consideration for the parol undertaking, and it is immaterial whether the resolution or action of the board is or not upon its records.
4. Substitution of one contract for another—Before the contract of a corporation can be said to have been abandoned and a new one substituted, it must be done by the consent of those having the authority to make the change.
5. Acts of agents—A corporation may contract by an agent, or the acts and conduct of those in authority may evidence such an assent or acquiescence in the performance of work as would impose on the company deriving the benefits an obligation to pay for it. Imeson & Limerick v. Newport, &c., Bridge Co. February 21, 1884. Campbell Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. E. W. Hawkins, Stevenson & O'Hara and R. W. Nelson for appellants; J. F. & C. H. Fisk for appellee.

Costs—

Copy of record—"Following the practice and precedents heretofore set by the Court of Appeals, the motion to correct the taxation of costs herein is overruled."

Note—This motion was based upon the fact that a fee of the clerk of the Court of Appeals for a copy of the record was included in the taxation, when no copy had in fact been made, the original being used by counsel under an agreement to pay for a copy. Bridges v. Welch. February 20, 1884. Barren Cir. Ct. Porter & Ritter and E. W. Hines for appellant; W. P. D. Bush for appellee.

Counterclaim—See Action, 1, 2.

County Bonds—

1. Mandamus—The fact that mandamus will lie to compel the county court to make a levy in order to satisfy a bond does not preclude the county bondholder from suing at law and obtaining judgment.
2. Suit in equity—It was not necessary for a bondholder to sue at law to enable him to reach a fund that had already been appropriated by the county for the payment of such bonds. He may maintain an action in equity to subject this fund in the hands of the receiver.
3. The fact that new bonds have been issued in satisfaction of the bonds for which the levy was made does not affect the funds collected for their payment.
4. Parties to action—The fund having been invested in real estate and so changed in its character that the aid of the chancellor is required to ascertain the extent of the trust and the mode of distribution, it was proper to make the county, as well as those having the trust fund in charge, parties to the action. Osenton v. Carter County. February 12, 1884. Carter Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. E. B. Wilhoit for appellant; Jas. D. Jones and A. Duvall for appellee.

County Claims—

1. Claim allowed under mistake of law—When the county court has made an order allowing a claim and the money has been collected and paid over to the claimant, the county can not recover the money upon the ground that the order of allowance was made by the justices under a mistake as to the law, all the facts being before them, and a legislative enactment authorizing the county to institute an action to recover the money back, upon the alleged ground that it was allowed under a mistake of law, was not intended to correct mere errors in judgment committed by the justices in passing upon the claim. Errors in judgment committed in the course of a judicial inquiry do not form a ground for relief in a court of equity. Boone County v. Dils. February 19, 1884. Boone Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Green & Riddell for appellant; O'Hara & Bryan for appellee.
2. Vendor who sold land to county and retained lien for purchase money did not waive it by obtaining judgment against sheriff to pay the money which had already been levied. Carter County Court v. Butler, ante, 661.

County Judge—

1. Negligence in taking surety—The liability of the county judge for taking insufficient surety upon a guardian's bond rests solely upon his taking "such person or persons as sureties as do not satisfy him of their sufficiency." If he takes a good bond and the parties afterward become insolvent, he is not responsible for any damage that may ensue; and if he accepts sureties who do not satisfy him of their sufficiency, any subsequent examination into their solvency will not excuse him.
2. In this case the county judge, who was sick at home when applied to by the parties, sent them to the county clerk, and when he went to his office found the bond executed. Before he approved the bond the clerk told him he had examined the parties under oath, and that the bond was sufficient, which was all the inquiry then made, although both principal and surety were unknown to the judge. Under these circumstances, the

court refuses to disturb a verdict against the judge. McIntyre v. Gritton. February 13, 1884. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. John W. Lewis for appellant; W. C. McChord for appellee.

Criminal Law—

1. Indictment for detaining a woman to have carnal knowledge of her must allege that detention was against her will. Wilder v. Commonwealth. ante, 635.
2. Forcible entry—An indictment at common law for forcible entry must aver that the person upon whose possession the forcible entry was made was then in actual and peaceable possession, whether by right or wrong, though it is not necessary to aver that he was at the time upon the lands. And the entry must be alleged to have been made without his consent. Commonwealth v. Orr. February 13, 1884. Gallatin Cir. Ct. Opin. by Bowden. J., Sup. Ct., aff. A. G. DeJarnett for appellant; J. J. Landram for appellee.

Decedents' Estates—See Final Order; Practice in Civil Cases, 1, 3—

1. Debtor and creditor—The acceptance by a creditor of a new note in lieu of an old one extinguished the old note and released from liability such of the obligors in the old note as did not sign the new one.
2. A release, in fact, or by operation of law of a cause of action, ex contractu, against one of several persons jointly bound, extinguishes the liability of all. Stuart, &c. v. Groves. February 27. 1884. Owen Cir. Ct. Opin. by Reid. P. J., Sup. Ct., rev. Hallam & Gordon for appellants; Geo. C. Drane for appellee.

Equity—

Reformation of contract—The chancellor alone has jurisdiction to reform a contract on the grounds of mistake in reducing it to writing, and both fraud and mistake being charged, the chancellor, having concurrent jurisdiction with the common-law judge as to fraud, had the right to dispose of both issues without jury. Imeson & Limerick v. Newport and Covington Bridge Co. February 21, 1884. Campbell Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. E. W. Hawkins, Stevenson & O'Hara and R. W. Nelson for appellants; J. F. & C. H. Fisk for appellee.

Estoppel—

1. An administrator, who was one of the heirs of the decedent, sold a tract of land belonging to the decedent and took the note for the purchase price payable to himself as administrator. The sale was made, possession delivered and the notes executed to the administrator with the knowledge and consent of the co-heirs, and upon the faith of their acquiescence the purchaser made a payment to the administrator upon the note and another payment to the assignee of the note. The administrator in a settlement of his accounts with the county court was charged with the amount of the note and each of the co-heirs received from the administrator a portion of the amount found to be due by that settlement, and must be presumed to have acquiesced in it.

   Held—That under the circumstances they are in equity now precluded from asserting claim to the note in the hands of the assignee, or disturbing the purchaser in his possession. Smith's Adm'rs v. Blair, &c. February 2, 1884. Marion Cir. Ct. Opin. by Lewis, J., Ct. of Ap., rev. Rountree & Lisle for appellant; W. B. Harrison for appellee.

2. Lapse of time—Mere passiveness, unless others have been induced thereby to alter their condition or expend their means, is not sufficient to deprive a party of relief.

The husband, acting as the agent of the wife, purchased land with her money, which he promised to cause the vendors to convey to her in fee, but without her knowledge or consent he fraudulently procured the conveyance to be made to their only daughter, reserving to himself and wife merely a life estate.

Held—That the wife is entitled to have the conveyance canceled, although she discovered its character within three months after its execution and remained passive twelve years thereafter, and three months after the husband's death. Terry v. Hill, &c. February 12, 1884. Barren Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Jones & Cockrill and E. W. Hines for appellant; J. J. C. Eubank for appellees.

Evidence—

Unsigned memorandum—It was error to permit the plaintiff to read to the jury an unsigned memorandum stating the amount due by the defendant without identifying the handwriting as that of the defendant. Crawford v. Gamm. February 20, 1884. Mercer Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. P. B. Thompson for appellant; E. J. Polk for appellee.

Final Order—See Appeal. 5; Vice Chancellor's Court, 2—

Decedent's estate—In a proceeding to settle a decedent's estate, the commissioner's report of claims, reporting appellants' claim as proper to be paid, was confirmed. At a subsequent term the court set aside the order of confirmation and again referred the case to the commissioner, directing him specially to hear evidence offered in regard to appellants' claim, and from that order this appeal is prosecuted.

Held—That the order appealed from is not final, as the appellant's claim has neither been allowed nor rejected. Watts, &c. v. Jones' Adm'r. February 20, 1884. Scott Cir. Ct. Opin. by Bowden, J., Sup. Ct., dis. Geo. E. Prewitt for appellants; James B. Linville for appellee.

Fraud—See Husband and Wife—

Cancellation of conveyance—Inadequate consideration—A woman over sixty years of age, who had lost her husband and only child, and was in delicate health, nervous and dissatisfied with those around her, was importuned by her nephew to make to him a deed to her entire estate, consisting of a large and valuable tract of land and the stock upon it, which she finally did at the house of the grantee and without advice, upon no other consideration than the agreement of the grantee to support her as long as she lived, and to pay a few small debts she owed, insignificant in amount. The grantee having furnished the grantor with only a scanty subsistence, and now refusing to support her unless she will live with him, she seeks to have the conveyance set aside.

Held—That although the age of the grantor at the time she executed the conveyance is not sufficient to indicate of itself mental imbecility, still, when considered with reference to her misfortunes and her nervous physical condition, the chancellor will require proof showing the utmost good faith of the grantee in obtaining the entire estate of the grantor

before he will uphold the conveyance, and the grantee having failed to show the required good faith, the conveyance is set aside. Davis v. Chaney. February 26, 1884. Allen Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Leslie, Botts & Alexander and J. & J. W. Rodman for appellant; W. L. Porter for appellee.

Frauds, Statute of—

1. Parol gift of land—Where one has entered under a parol gift of land and has been in possession for more than fifteen years, neither the donor nor his creditors can oust the donee of possession upon the ground that the gift was not in writing.
2. Possession—Notice to creditors—A parol purchase of land and possession under it is notice to the creditors of the vendor, and they can not interfere and disturb the sale upon the ground that the contract was not in writing. Wade, &c. v. Norman, &c. February 28, 1884. Grant Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Collins & Fenley for appellants; E. H. Smith for appellees.

Fraudulent Conveyance—

1. Consideration—A father conveyed to his children about 8,000 acres of land for an expressed consideration of more than $11,000, the receipt of which was acknowledged in the deed. In an action to set aside the conveyance as fraudulent the grantees insist that they hold the land in secret trust to pay their father's debts, and for no other consideration.

   Held—That if the purpose was to protect creditors, or the real consideration was the payment of debts, it should have been so expressed in the deed; and if even expressed in the deed, if the purpose was to hinder and delay creditors, as it evidently was in this case and not an assignment for creditors, the chancellor would disregard the conveyance. Turner, &c. v. Sewell, &c. February 26, 1884. Hardin Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. Lindsay for appellants; John L. Scott for appellees.
2. Where after, or on the eve of, the insolvency of a debtor his entire estate or the greater part of it is found in the name of his son, it requires proof of the most satisfactory character to establish the fairness of the transaction, City National Bank, &c. v. Gardner, &c. Paxton, &c. v. City National Bank, &c. February 5, 1884. McCracken Ct. Com. Pleas. Opin. by Lewis, J., Ct. Ap., aff. Bigger & Reid and Gilbert & Reid for appellants; Sam Huston and W. T. Bullitt for appellees.

Garnishee—

1. Service—To create a proper service upon a garnishee a statement of the debt or demand garnished should be endorsed on the summons or notice.
2. Although the service upon the garnishee be not sufficient to create a lien, if he answers the lien attaches. A garnishee answering even before service upon him would be held to account, and his appearance would give a lien over others behind in point of time. City National Bank, &c. v. Gardner, &c. Paxton, &c. v. City National Bank, &c. February 5, 1884. McCracken Ct. Com. Pleas. Opin. by Lewis, J., Ct. Ap., rev. Bigger & Reid and Gilbert & Reid for appellants; Sam Houston and W. T. Bullitt for appellees, Gardner, &c.

Grist Mills—

Right conferred by county court to erect a grist mill is a vested right, and can't be taken without compensation to the grantee. Anderson v. Cin. Sou. Railway, ante, 663.

Guardian and Ward—

1. County court settlement—While the county court settlement was not conclusive of the amount due the ward from his guardian, it was prima facie evidence of the amount due. McIntyre v. Girtton. February 13, 1884. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. John W. Lewis for appellant; W. C. McChord for appellee.
2. County court settlement—The settlement of a guardian made and recorded in the county court is prima facie evidence between the parties interested, and this presumption applies even where the principal of the personal estate has been invaded.
3. Maintenance of ward—The mother, after the father's death, is bound to support the family, if of sufficient ability, but the guardian having in good faith submitted to arbitration the claim of the mother for the maintenance of the wards and paid the sum awarded, is entitled to credit therefor. James v. Buchanan. February 27, 1884. Lincoln Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Hill & Alcorn for appellant; Welch & Saufley for appellee.

Homestead—

1. Not essential to, that there should be a house on the land. Bennett v. Baird, ante, 636.
2. If at the time the debtor moved upon the land and began improvement he was already indebted, he can not claim a homestead as against such indebtedness. Fish v. Hunt, ante, 653.
3. The owner of a homestead may sell it, and with the proceeds purchase another homestead, which will be exempt from debts from which the former homestead was exempt. Carter Bros. & Co. v. Liles. February 5, 1884. Warren Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. B. F. Proctor and E. W. Hines for appellants; Wilkins & Sims and W. H. Julian for appellee.

Husband and Wife—See Estoppel, 2—

Fraud—Creditor—The husband having improved the property of the wife with his own means, and upon his own credit, designing thereby to defraud his creditors, in an action by his creditors seeking to subject the property upon that ground the chancellor should have directed the property as improved to be leased, and the payment to the plaintiffs, in satisfaction of their debt, of the rents, in the proportion that the improvements paid for by, or put upon the lot upon the credit of, the husband increased its value. It matters not that the husband defrauded the mechanics and got their services for nothing. Barbour v. Gaines, &c. January 31, 1884. Carroll Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. W. B. & H. M. Winslow for appellant; Masterson & Gaunt, W. M. Fisher and E. W. Hines for appellees.

Infancy—

1. Although an infant has no right to commence an action without a guardian or next friend, yet an action so commenced should not be dis-

missed, over the plaintiff's objection, after he has attained his majority. Philpot v. Benge. February 27, 1884. Clay Cir. Ct. Opin. by Richards. J., Sup. Ct., rev. J. L. Scott for appellant; B. F. Holman for appellee.

2. When it appears in evidence that a defendant, sued as an adult, is an infant, the plaintiff should be required to proceed against him as an infant, and if the court render judgment against the infant without requiring this to be done, it should grant the relief on a motion for a new trial, which, at another time, it would have to grant on petition, Shrout, &c. v. Burgess. February 6, 1884. Nicholas Cir. Ct. Opin. by Bowden, J.. Sup. Ct., rev. Kennedy & Kennedy for appellants; H. L. Stone for appellee.

3. A note executed by an infant is not binding. He can only be bound on an implied assumpsit for necessaries.

4. Necessaries—If a guardian fails to supply his ward with necessaries a stranger may furnish them, taking the risk of what may be determined necessaries suited to the rank and estate of the infant, and for such the estate of the infant may be held liable. Instruction in music and painting furnished an infant without the authority of her guardian is held not to come under the head of "necessaries," considering the rank in life of the infant, and the value of her estate, which consisted of about $6,000 in personalty, but $50 furnished the infant to buy mourning goods upon the death of her mother is classed under that heard and held to be recoverable as such. DeMoss, &c. v. Giltner. February 13, 1884. Oldham Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Ben S. Robbins for appellants; Carroll & Barbour for appellee.

Injunction—

Action in bond—Counsel fees—When a defendant in point of fact employs counsel merely to have an injunction dissolved, in an action upon the injunction bond he is entitled to recover what he paid for that purpose, if reasonable in amount, and the fact that as a means of procuring the dissolution counsel entered a demurrer to the petition, and thus got rid of the action itself, does not affect the right of recovery on account of counsel fees, it not appearing that anything was paid, or agreed to be paid, to counsel for getting rid of the action itself. May v. Deposit Bank, &c. February 20, 1884. McLean Cir. Ct. Opin. by Bowden. J., Sup. Ct., aff. Cook & Givens for appellant; Sweeney & Sons and Weir, Weir & Walker for appellees.

Instruction—See Landlord and Tenant, 1,

Insurance—

1. Sale of policy—One who has no interest in the life of another can neither take out a policy of insurance on another's life nor obtain by purchase, assignment or otherwise a policy already taken out on the life of another.

2. Therefore, the contingent interest of a debtor in a policy taken out by him upon the life of another upon which he has paid the premiums can not be sold to pay his debts. Settle v. Hill, &c. February 20, 1884. Hart Cir. Ct. Opin. by Reid. P. J., Sup. Ct., rev. W. Settle for appellant; Porter & Ritter for appellees.

Jailer—

Negligently allowing prisoner to escape—In an action against a jailer and his sureties for negligently allowing the defendant in a bastardy proceeding to escape, allegation and proof of the arrest, escape and judg-

ment warrant a recovery in damages for the amount of the bond in default of which the prisoner was committed unless the officer can show that the prisoner was insolvent, or in other way prove that the plaintiff has sustained no loss. The plaintiff is not required to allege or prove facts showing that he is damaged; the burden is on the officer to disprove the fact. Commonwealth, &c. v. Shepperd. February 13, 1884. Pulaski Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Curd & Waddle for appellants; Morrow & Newell for appellee.

Joint Obligors—See Debtor and Creditor, 1, 2.

Joint Property—See Judicial Sale, 1, 4; Judgment, 1.

Judgment—

1. Validity—Final order—Although it does not appear that a summons, was served upon the defendant to answer a petition for a new trial, yet as the record shows that it was upon his motion that the petition was submitted to the court for its judgment, the judgment granting a new trial was valid, and, being a final order, the court had no power at a subsequent term to set it aside. Johns v. Wandelohr's Adm'r. February 27, 1884. Pendleton Cir. Ct. Opin. by Bowden, J., Sup., Ct., rev. C. H. Lee for appellant; L. T. Applegate for appellee.
2. Directing sale of a share in land to pay a mortgage does not bar court from afterwards ordering sale of entire tract on cross petition of other share owners. Kean v. Tilford, &c., ante, 655.

Judicial Sales—

1. Appraisement—The act requiring the appraisement of property sold under order of the chancellor does not apply to a sale for a debt created before the passage of the act.
2. Inadequacy of prices—The mere fact that property sold for less than its value will not authorize the reversal of a judgment. Reiley, &c. v. Young. February 16, 1884. Kenton Cir. Ct. Opin. by Pryor, J. Ct. Ap., aff. R. D. Handy for appellants; Eginton & Gray for appellee.
3. The right of any one of several joint owners to demand a sale of the land in equity can not be defeated by one of them conveying away his share with a clause prohibiting a sale. Kean v. Tilford, &c., ante, 655.
4. The statutes prohibiting sales where the conveyance forbids it apply only to actions by guardians and committees to sell the infant's or lunatic's interest. Kean v. Tilford, &c., ante, 655.
5. Civil Code, section 490, subsection 2, relating to sales of property jointly owned applies as well to that held in common or coparcenary. Ibid, 655.
6. Section 497, subsection 7, providing if one joint owner objects, his share shall be set apart does not apply if property is indivisible. Ibid, 655.

Landlord and Tenant—

1. Purchase of property on leased premises—When a third party in good faith purchases property on the leased premises from the tenant, the validity of his title can not be made to depend upon his paying the consideration at the time of the purchase and removal, but as the purchaser in this case based his claim solely upon having paid his father, the landlord, the cash at the time of his purchase, he was not prejudiced by the

action of the court in so instructing the jury as to make such payment the condition upon which he could recover. Harnett, &c. v. Nichols, &c. February 27, 1884. Fayette Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. Bowden, J., dissenting. Z. Gibbons for appellants; Hunt & Darnell for appellee.

2. Attachment — Landlord's proceeding by attachment under section 5, article 2, chapter 66, General Statutes, are not to be held to the same strictness of proof as should be required of parties attaching under the provisions of the Code to secure ordinary debts, but there must be at least some proof that the attachment was not sworn out in good faith. Where the premises are rented for stock and farming purposes, it must be presumed that the parties contemplate a sale of the produce during the proper seasons, and such sales made without endangering the landlord's security for his rent, can not be made the basis of an attachment. Wigham v. Carpenter. February 18, 1884. Casey Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Hill & Alcorn for appellant; Stone & Stone for appellee.

License—

A druggist may sell spirituous liquor by the half pint, although he has no license, provided he has a physician's prescription therefor. Commonwealth v. McGrorty, ante, 674.

Lien—

1. Vendor's—Under the Revised Statutes a vendor had a lien only where there was an express written contract with the vendee therefor, or the amount of the unpaid purchase money was stated in the deed.
2. A vendee executed to the assignee of the note executed by him for the purchase money a new note for the principal and interest of the old note, reciting that it was in lieu of the old note, and further reciting that the payee "is to have the same lien on the land for the payment of this note that he had for the payment of the old note." Held—That the assignee of the old note having no lien on the land for its payment, has no lien for the payment of the new note. Cardin, &c. v. Evan's Ex'or. February 13, 1884. Hardin Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. J. P. Hobson for appellants; J. W. Twyman for appellee.
3. Effect on lien for purchase money of failing to state in deed the amount still due. Tate v. Hawkins, ante, 627.

Limitations, Statute of—

1. Effect of a partial payment to stop the running of the statutes Tate v. Hawkins, ante, 628.
2. If note is barred, lien securing note is also. Id.

Malicious Prosecution—

1. Pleading—Burden of Proof—In an action for malicious prosecution the plaintiff must allege that the proceedings against him were malicious and without probable cause; and if the answer denies these facts the burden is on the plaintiff to prove them.
2. Evidence—Under such a denial the defendant may prove, as a fact tending to show probable cause, that he acted under the advice of a licensed lawyer.
3. Probable cause—If the prosecutor placed all the facts before his counsel and acted upon his opinion, proof of the fact makes out a case of probable cause provided the disclosure appears to have been full and fair, and

when the defendant has introduced proof conducing to show that fact, the court should instruct the jury upon the effects of such testimony. Crawford v. Keyser. February 13, 1884. Lewis Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Garland & Pugh for appellant; Bullock & Fitch for appellee.

Mandamus—See County Bond, 1—

Proper remedy to compel officers of corporation to hold election for new officers. Orr v. Bracken, &c., ante, 682.

Mistake—See County claims, 1.

Negligence—

1. Contributory—Where one who has been run over and killed by a railroad train came to his death by reason of his own negligence in being on the track, no recovery can be had of the railroad company by his personal representative unless those in charge of the train were aware of his negligence, and, after discovering him on the track, could by the exercise of proper care and diligence have avoided the injury. It was error in instructing the jury to make the failure to discover the decedent on the track an element of negligence. L. & N. R. R. Co. v. Green's Adm'r. February 27, 1884. Henderson Cir. Ct. Opin. by Reid, P. J. Sup. Ct., rev. M. Yeaman and W. Lindsay for appellant; W. P. McClain for appellee.
2. Liability of county for—An action cannot be maintained against a county to recover damages for an injury to the person resulting from the negligence of the county in failing to keep in repair a privy owned and kept by the county for the use of the public. Moberley v. Carter County. February 21, 1884. Carter Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. J. R. Botts for appellant.

Notice—See Appeals, 1; Corporation, 1, 2; Surety, 3.

Peremptory Instruction—

1. Where a party on whom the burden of proof rests has introduced his evidence, a verdict for the other party should not be rendered, though the court might think a contrary verdict should be set aside, if the evidence conduces in any degree to show a right to recover.
2. A party can not move the court for a verdict on his own evidence unless it is composed of records or uncontested official documents. Woods v. McCombs' Adm'r. February 20, 1884. Christian Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. John Feland for appellant; S. J. Boyd and Landes & Clark for appellee.

Personal Representatives—

Promises to pay debt of decedent—Where a decedent has left no estate, so that a creditor could not by any diligence get a cent, the agreement of a creditor to give time does not constitute a sufficient consideration to uphold the administrator's personal promise in writing to pay the debt. Gibbons' Adm'r v. Smith. February 27, 1884. Clark Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. Geo. B. Nelson for appellant; R. Haggard for appellee.

Pleading—See Vendor and Vendee, 2—

1. The averment that the defendant acted "carelessly and negligently" is not the allegation of a mere legal conclusion. McIntyre v. Gritton. February 13, 1884. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. John W. Lewis for appellant; W. C. McChord for appellee.

2. A demurrer for want of jurisdiction lies only where the pleading discloses the want of jurisdiction.
3. Failure to demur—Where the objection is that the court has no jurisdiction of the defendant, if it is not taken by special demurrer it is waived. It can not be made after verdict. Ky. Cent. R. R. Co. v. Holliday. February 6, 1884. Kenton Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. O'Hara & Bryan for appellant; R. Richardson for appellee.
4. Inconsistent amendment—In an action by a wife, who had been abandoned by her husband, to set aside a conveyance from her husband to his father as fraudulent, and to have the property conveyed set apart for her maintenance and support, an amendment alleging that a part of the purchase money was still due from the father to his son and asking that the amount due be adjudged to her as alimony, was not inconsistent with the original petition, nor did the two pleadings present separate causes of action, the purpose of the amendment being to secure what was due the husband in the event the conveyance could not be set aside. It was, therefore, error to require the plaintiff to elect which cause of action she would prosecute. Dragoo v. Dragoo, &c. February 12, 1884. Mason Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Whitaker & Robertson for appellant; Barbour & Cochran for appellees.

Pleading and Practice in Criminal Cases—

1. Reading indictment to jury—After the arraignment of the defendant, his plea of not guilty and the introduction of the greater part of the evidence for the Commonwealth, it was error to allow the attorney for the Commonwealth to read to the jury as evidence the indictment and endorsements thereon, as they were calculated to impress the jury with some force as the result of the sworn deliberation of the grand jury of their county. Mace v. Commonwealth. February 21, 1884. Perry Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. John E. Cooper for appellant; P. W. Hardin for appellee.

Practice in Civil Cases—

1. Misjoinder—Jurisdiction—An action was instituted in the Campbell Chancery Court against the surety upon the administration bond of M. against the executrix of M. to settle her testator's accounts as administrator, and to require her to account for money received by her testator under a contract to rent and sell land and collect the money therefor, and distribute it among the heirs of his intestate. Process was served upon the executrix in Mason county.

   Held—That the action against the executrix for a settlement of her testator's accounts, and the action to require her to account for money collected by him as the agent of his intestate's heirs in renting and selling land, were improperly joined, but as there was no motion to compel the plaintiffs to elect which cause of action they would prosecute, the objection to the misjoinder was waived, and although the action to require the executrix to account for money received by her testator, as agent, and not as administrator, should have been brought in the county where process was served, yet as the executrix did not object to the misjoinder until after judgment was rendered against her, and judgment could have been rendered against the surety (although none was ren-

dered), she can not now object to the jurisdiction of the court in which the action against the surety upon the administration bond and the action to settle her testator's accounts, as administrator, were properly brought.

2. Distribution—Affidavit of distributees—As the two causes of action against the executrix were allowed to be considered together as one action, to settle the estate, no affidavit by the distributees was necessary to prove their claim to their distributable shares.

3. Action to settle decedent's estate—It was not necessary to wait six months after the death of the intestate to institute suit against the administrator to settle the estate. Maddox's Ex'tx v. Williams, &c. February 9, 1884. Campbell Chy. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. Wadsworth & Sons and Wm. Lindsay for appellant; Thos. J. Throop for appellees.

4. Exceptions to depositions—When exceptions to depositions are based upon facts which do not appear from the record, those facts must be established by proof aliunde, and no proof appearing in the record, the court can not presume that the facts were taken for confessed.

5. Order of taking depositions—No party to an equitable action can testify for himself in chief after taking other testimony, but as the other testimony in this case is sufficient to support the judgment, the error of the court in overruling exceptions to the depositions of the successful party is not a ground for reversal. Agnew v. Warfield, &c. February 27, 1884. Henderson Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. T. E. Ward, for appellant; Charles Evans for appellees.

6. Judgment non obstante veredicto—Only when the pleadings entitle a party thereto can he have a judgment non obstante veredicto. When they present an issue upon the merits and the testimony is conflicting such a judgment can not be rendered. Arnold's Adm'r v. Arnold. February 13, 1884. Hardin Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Hays & Bush for appellant; Montgomery & Marriott for appellee.

Presumption—

The execution of a note raises the presumption of a settlement of previous accounts existing between the parties. McCampbell v. Huss' Ex'tx. February 27, 1884. Shelby Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. L. A. Weakley for appellant; Bullock & Beckham for appellee.

Process—See Garnishee, 2—

On cross petition—A summons upon a cross petition, designating by number the action in which the cross petition was filed, was sufficient. The Code does not require that the style of the case in which the cross petition has been filed shall be given. Stuart, &c., v. Grover. February 27, 1884. Owen Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Hallam & Gordon for appellants; Geo. C. Drane for appellee.

Riparian Owners—

Rights of defined. Anderson v. Cin. S. Ry., ante, 668.

Set-Off—See Action, 1, 2.

Surety—

1. Employer discovering shortage in accounts of his agent should give notice to surety of the agent. Otherwise sureties are not liable for money collected afterwards by agent. Conn. Mut. Life Ins. Co. v. Scott, &c., ante, 639.

2. Sureties for A are not liable for business carried on by him and his son as A & Co. Ibid, 639. If a surety pays the debt of his principal his claim therefor is for money had and received. Should this claim be merged in a written obligation which discharged the original demand, the new contract would be supported by a sufficient consideration even though it were executed between the date of the principal's adjudication in bankruptcy and his final discharge. Lane v. Lane. February 6, 1884. Montgomery Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. H. L. Stone for appellant; Peters & Tyler for appellee.

Taxation—

1. Collector—Liability of—Under the charter of appellee, which provides that the clerk shall make out and deliver to the tax collector a list of the persons named in the assessment roll, and the amount of the taxes for the current year, "with a precept under the seal of the city commanding the collector, in the name of the city, to collect the taxes charged in said list, by demanding payment," &c., the mere failure to furnish the collector with the precept does not absolve the collector and his sureties from the payment of money actually received by the collector from the taxpayers. Poage, &c., v. City of Ashland. February 6, 1884. Boyd Cir. Ct. Separate opinion by Judges Reid, Richards and Bowden, Sup. Ct., rev. L. T. Moore for appellants: John F. Hager for appellee.
2. Exemption—Under an amendment to appellee's charter providing that "it shall be exempt from the payment of any State, county or municipal tax or license for transacting business in the State of Kentucky," the company is exempt from the payment of all taxes, and not merely from paying license to carry on its business. The words "tax" and "license" were not used as synonymous terms. City of Bowling Green v. Ky. Masonic Mutual Life Ins. Co. February 20, 1884. Warren Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. V. M. Potter for appellant; Porter & Porter for appellee.
3. Exemption of property from, is ordinarily a privilege personal to the owner, but in a case specified passes to the purchaser. Commonwealth v. Owensboro, &c., R. Co., ante, 650.

Tender—

The appellee can not be made to answer in damages for his failure to tender to appellant a note, the appellant having notified him in advance that the note would not be received if tendered. Mundy v. Kean's Adm'r. February 19, 1884. Jefferson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. M. Mundy and W. Lindsay for appellant; Chas. H. Gibson for appellee.

Time—

Extension of time to file petition for rehearing, mode of computing, Louisville, &c., R. R. Co. v. Turner, ante, 647.

Usury—

1. The constitution of appellant provides that money on hand may be loaned among the members, and the right to precedence in said loan shall be determined at each meeting, as follows: "The highest bidder, upon payment at the time of his bid into the treasury, shall be entitled to precedence in borrowing the money which shall be for loan at the next meeting thereafter."

Held—That amounts bid under this provision were for the use of the money, and, being paid in addition to legal interest, were usurious. Centenial Building, &c., Association v. Mitchell. February 13, 1884. Kenton Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. W. W. Cleary for appellant: Simmons & Schmidt for appellee.

2. The appellee having sued appellants upon a note executed by them for an advance loan upon five shares of appellee's stock, the appellants are not entitled to a credit for the amount deducted "as premium on each share," as the presumption is, in the absence of proof, that the shares of stock were worth the premium contracted to be paid, and as it nowhere appears that this sum was retained for the loan or forbearance of money.
3. The allegation that the defendants were charged interest on the full amount of the loan, after they had paid "large amounts of money upon the loan," is too indefinite to entitle them to recover anything therefor on the score of usury. Ruffra, &c. v. Kenton Building Association. February 20, 1884. Kenton Ch'y Ct. Opin. by Richards, J., Sup. Ct., aff. R. D. Handy for appellants; Chaney & Scott for appellee.

Vendor and Vendee—

1. Defective title—When it does not appear that the vendee was misled by the vendor, or that he was ignorant of the condition of the vendor's title, he must be presumed to have relied upon the warranty in the deed, and in an action upon the purchase-money notes, there having been no judicial eviction and no insolvency or nonresidency being alleged, mere defect in title is no defense. Hoertz, &c. v. Marrett, &c. February 23, 1884. Lou. Ch'y Ct. Opin. by Hargis, Ch. J., Ct. of Ap., aff. Harrison & McGrain for appellants; W. R. Abbott and Thomas & John Speed for appellees.
2. Pleading—In an action by a vendor to recover of the vendee the purchase price of land, the plaintiff must allege a sufficient consideration for the defendant's promise, as that the vendor's contract was in writing, or that possession was delivered to the vendee. Wade v. Witt. February 6, 1884. Simpson Cir. Ct. Opin. by Bowden, P. J., aff. R. Rodes & I. H. Goodnight for appellant; Milliken & Bush for appellee.

Verdict—

1. If, upon motion of a party, instructions are given and questions propounded to the jury which require both a general and a special verdict, that party can not complain that the court rendered judgment on the general verdict, if not inconsistent with the special verdict.
2. Where a party has called for both a general and a special verdict it is not necessary that the latter should be sufficient to support a judgment before one can be rendered. Ditto v. Roberts. February 6, 1884. Henry Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. G. C. Drane for appellant; Carroll & Barbour for appellee.

Vice-Chancellor's Court—

1. No finding or judgment of the Louisville Vice-Chancellor can be set aside or modified by the chancellor or judge of the Jefferson Court of Common Pleas.
2. Final order—The action of the Jefferson Court of Common law in refusing to entertain such a motion is not such a final order as will

support an appeal. Basye v. Lindenberger, &c. February 6, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J. Sup. Ct., dis. Elliott & Hemingray for appellant; John Stites for appellees.

Water Courses—

Rights of riparian owners in. Anderson v. Cin. So. Ry. ante, 663.

Wills—

Construction of devise—A testator by his will directed his executors to pay to his daughter a certain sum, "to be placed at interest in safe hands and her to receive the interest on the same, and also to use whatever amount of the principal that may be necessary for her support and comfort, and at her decease whatever of said amount may be left may be divided as the other part of my estate is divided among my heirs." Held—That this was intended as a direction to pay the amount named to a trustee for the use of the daughter, and did not mean a literal and immediate payment of the money to her. Simpson's Ex'ors v. Simpson. February 16, 1884. Adair Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Jos. E. Hays for appellants; T. C. Winfrey for appellee.

THE

# KENTUCKY LAW REPORTER.

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## CURRENT TOPICS.

A woman has recently been refused admission to the bar in Penn. So she was to the Sup. Ct. of U. S., but time, an act of Congress and public opinion have changed that rule, and it is hoped that those influences may finally operate to arouse some of the spirit of gallantry in the courts of Pennsylvania. In this connection it may be remarked that Secretary Folger (overruling a late decision of the solicitor of the treasury), permitted a woman to be examined for a certificate of qualification to command a Mississippi steamboat.

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It may not be generally known that at one time it was a good and sufficient defense in England to an indictment for murder to set up that the deceased was mere Hibernicus—only an Irishman.

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South Carolina is said to be the only State in the Union that has no divorce law.

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Next after Hamlet's well-known question, whether it is better "to take up arms against a sea of trouble, and by opposing

end them?" the following was supposed to be the best instance of mixed metaphor: "I smell a rat. I see him floating through the air; but, mark me, I shall nip him in the bud." But the other day a Philadelphia orator beat both by working off the following: "May it please the court, these gentlemen have gone on until by assiduous incubation they have hatched something that will hold water, and upon this they hang their bill."

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At a recent examination for admission to the bar in Ohio only twelve out of twenty-four applicants were admitted. It is a great pity we can not have something of the same rigor in this State.

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In People v. Woodward, 31 Hun., 57, it has just been held that taking a horse from another's stable, killing it and burying it in a pit does not necessarily constitute larceny. In larceny the taking must be for the purpose of converting to the use of the taker. There must be a felonious intent. Here there was no such intent. The act was a malicious mischief and punishable as a misdemeanor.

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The recent decision of the U. S. Cir. Ct. in Tenn., upon the validity of the act creating a board of railroad commissioners to fix fares, seems to rest mainly upon the fact that the act is an attempt by the State to regulate interstate commerce, and is, therefore, contrary to the U. S. Constitution and void. Judge Hammond bases his opinion exclusively on this ground. Judge Baxter is said to make another objection to the act—that too much latitude is given the jury in fixing a punishment for violation by the railroads of the act.

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The Supreme Ct. of Nevada holds that a stockholder can not be held as a garnishee for the debts of the corporation to the extent of his unpaid subscription to its stock (McKelvey v. Crockett, 2 West Coast Rep., 37). This question is important and, so far as we know, has never arisen in this State. We,

therefore, add the authorities on it which it is said, though not in conflict, will bear comparison: Bingham v. Rushing, 5 Ala., 405; Brown v. Union Ins. Co., 3 La. Ann., 177, 182, 188; Faul v. Alaska, G. & S. M. Co., 14 Fed., 657; In Re Glen Iron Works, 17 Fed. Rep., 824; Sawyer v. Hoag, 17 Wall., 610.)

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The law upon the subject of false representations is very clearly stated in the following case lately decided by the New Hampshire Sup. Ct.:

As to whether a false representation made by a vendor in the sale of land is actionable or not, depends upon whether it relates to a matter about which both parties have not equal means of knowledge, and whether it is an expression of mere opinion or an affirmation of a fact. Thus false representations made by a vendor in the sale of land relating to the quality and productiveness of the soil, its capacity to produce crops or support cattle, intended to deceive and actually deceiving vendee, are actionable. (Messer v. Smyth.)

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The Albany Law Journal in its diligent search after the curious in the reports has unearthed the following:

"Any child" in a statute may include twins. In Hall v. Com., Hardin (Ky.), 479, the defendant was charged with bastardy under a statute which provided that the father "of any bastard child," etc., should, etc. He tried to escape its provision on the ground that the corpus delicti was two children at one birth. But the court overruled his plea. Said Edwards, C. J.: "Neither Spallenzini, Buffon or other naturalists have asserted in their theories that the impregnation of the female with double fœtus by the same man was impossible; and in every year's practice many an honest man has the merit of fathering two fine girls at a birth, by many an honest woman; so that there is nothing incredible in the charge in this particular instance. If he was the father of both as the conviction states, he was the father of either, and the expression of the statute 'any bastard child' will apply to each and either." "Every year's practice" in this connection is certainly unique.

The reports in this country already number 3,000 volumes, and are increasing at the rate of about 100 volumes annually. This is very disheartening to those whose profession it is to know the law, and these figures are very influential in making proselytes to codification. But suppose a committee appointed in this State to codify the law. Their work up to a certain point would be easy. They would go through the reports of the State, gather all the principles laid down in the cases, and arrange them in the form of a statute. Thus we would no longer look to Bustard v. Gates, 4 Dana, 429, for the proposition that a purchaser at a chancery sale is protected, though the judgment may be erroneous; or to Smead, &c. v. Lee, 1 Met., 634, to learn that a creditor who takes from his debtor a bill or note as collateral security for an existing debt is not an innocent purchaser for value. These propositions have been so long recognized and acted on that the codifiers would at once embody them in a statutory form and all other principles equally well recognized. But how greatly their difficulties would increase when they came to the innumerable questions which have never arisen in this State, but which a Code to be complete and satisfactory must provide for in advance. Suppose these questions when they have arisen in other States have been decided variously, what will the codifiers do? Which State will they follow? They can not sit, like judges, on the questions, hear thorough argument by both sides, and lay down the principles in the light of an actual state of facts in a given case. This seems the great difficulty in the way of codification. It is not insurmountable, but a very serious one.

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In Stephens v. Allen, &c., the Sup. Ct. of Oregon, 2 West Coast Rep., 193, that whether a deed given in consideration of the grantee's assuming and paying the debts of the grantor is an absolute sale of the land conveyed, or a mere mortgage to secure the repayment of such debts, depends upon the intention of the parties at the time of conveyance. Such intention may be ascertained by evidence, oral or otherwise, of the situation of the parties, and the value of the consideration in connection with the value of the property conveyed.

A widow having a claim against the U. S. in favor of herself and children, of whom she was guardian, agreed to pay her attorneys 50 per cent. of the claim if they succeeded in collecting it. After a vigorous prosecution of it by the attorneys $27,000 was recovered and one-half of that amount retained by them. Held—The contract bound the children. Contracts with attorneys for compensation in prosecuting claims against the United States are not void because contingent on the amount recovered. And the well known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justify a liberal compensation in successful cases where none is to be received in case of failure. (Taylor v. Beims, U. S. Sup. Ct., Jan., '84.

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In Iowa v. Benge, Ia. Sup., Ct., it is held that the incompetence of an attorney does not constitute a ground for a new trial in civil cases. But in Criminal cases, especially in those involving the life of the accused, the court would be justified in disregarding the rule.

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It is said that the chances are 2,866,000,000,000,000,000,000 to 1 that an individual can not write his name with a pen three times exactly alike, and even if two signatures perfectly coincide it is a probability, amounting almost to a certainty, that one of the signatures is a forgery.

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It appears to be well settled that a tombstone is a proper expenditure to be made by an executor for which he will be allowed in settling his accounts; and it is proper, though the estate is insolvent and although the tombstone was not directed by the will. (Crapo v. Armstrong, Iowa Sup. Ct.; Porter's Estate, 77 Penn. St., 43.)

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In England a wife recently sued her husband for slander in saying that she was hopelessly insane. She based her action

on the provisions of the Married Woman's Property Act, claiming that that act authorized a wife to sue her husband to recover her property taken by him, and that her reputation was her most valuable property. In support of which view she cited the following high authority:

> "Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands,
> But he that filches from me my good name
> Robs me of that which not enriches him.
> But makes me poor indeed."—Othello, II, sc. 3.

But the Lord Chief Justice was not convinced, and dismissed her petition.

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Where two persons voluntarily fight each other, either may recover from the other for the injury suffered (Shay v. Thompson, Wis. Sup. Ct., 18 N. W. Rep., 473). The plaintiff and defendant owned adjoining farms, and had a personal difficulty over the division line between their lands. They were both old men, but (as the court remarks) it is but just to say they fought with great spirit and brutality. But the defendant, being the larger of the two, gouged both of plaintiff's eyes and permanently injured one of them. The authorities on this subject go on the principle that the fighting, being unlawful, the consent of plaintiff to fight is no bar to his action, and he may recover. (2 Greenl. Ev., section 85; Comm. v. Colberg, 119 Mass., 350; Adams v. Waggoner, 33 Ind., 531.)

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## KENTUCKY COURT OF APPEALS.

### PRICE v. KEENEY, &c.

(Filed March 15, 1884.)

1. Estoppel—Married woman—In a suit on a note against the makers A and B, his wife and C, their surety, personal judgment was rendered against all without it appearing that B was a married woman. But C knowing this fact paid off the judgment, had it assigned to him and brought suit on it to subject the wife's land. Held—She was not estopped from pleading her coverture in this action as C was cognizant in the original action that she was a married woman, and, therefore, acted with knowledge and could not claim to have been misled to his prejudice.

**2. Married woman—Contract—Where it appears that the defendant is a married woman, she being unable to make a contract except for the purposes prescribed by statute, the plaintiff must show that his claim is within the statutory exceptions.**

Appeal from Adair Circuit Court.

Opinion of the court by Judge Hines.

Appellant was surety on a note for P. W. Vaughn and his wife, M. C. Vaughn. Suit was brought on the note and personal judgment taken against all, with no suggestion in the record that M. C. Vaughn was a married woman. Appellant paid the judgment and had it assigned to him, and then brought this action in equity to subject to its satisfaction certain lands descended to Mrs. Vaughn subsequent to the creation of the debt. To this it is answered that at the time of the execution of the note, and also at the time of the rendition of the judgment against her, Mrs. M. C. Vaughn was a married woman and under all the disabilities of coverture, to which it is replied that Mrs. Vaughn is now estopped to make that defense because she did not interpose it in the action in which personal judgment was rendered against her. From a judgment dismissing the petition this appeal is taken.

It is insisted for appellant in argument, as in pleading, that Mrs. Vaughn is estopped to impeach the personal judgment rendered against her; that the judgment is valid until reversed or set aside by direct proceedings. Conceding, for this purpose only, that this is true and that the judgment is not void, it does not follow that it is an enforceable judgment. There can be no application of the doctrine of estoppel which will prevent Mrs. Vaughn from showing that she was a married woman at the time of the rendition of the judgment—a fact of which appellant was cognizant—as he does not pretend to a want of knowledge, or that by the failure to then plead that fact he was in any way misled to his prejudice. There can be no estoppel where the act or the failure to act was not prejudicial to the party complaining by reason of his reliance thereon. She may do this, not for the purpose of showing that the judgment is void, but for the purpose of showing that the property sought to be subjected is not liable under the statute. Where it is shown, as here, that a woman is under all the disabilities of coverture, she has no power to bind her estate

by any contract of hers except for the purpose and in the manner prescribed in the statute; and as the general rule is that she can not bind her estate, it devolves upon the person seeking to subject her property to show that his claim comes within the exceptions. It is not shown that the debt which appellant was compelled to pay was for necessaries, without which the land of the wife held as general estate, as this is, can not be subjected to the payment of her debts. This court said, in the case of Green v. Page, 80 Ky., 369, that in a suit by an assignee against an assignor it was not necessary, in order to establish legal diligence, to take personal judgment against a feme covert who was a party to the note, although it might have been done, and that because such judgment would have been worthless, since the note was not executed for necessaries, and, therefore, did not come within the statutory exceptions. It may be said in this case that the evidence affirmatively shows that the debt was not created for necessaries, and it may also be said that the pleadings in this case admit that Mrs. Vaughn was, at the time of creating the debt and at the time of judgment, under all the disabilities of coverture.

In those States where a married woman may bind her estate generally, without regard to the character of the consideration for her promise, a different rule would apply.

Judgment affirmed.

H. C. Baker for appellant.

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## PEPPER v. MAYES, &c.

(Filed March 18, 1884.)

1. Official liability—Ministerial officers who act under a process, apparently regular and issuing from a court having jurisdiction of the subject-matter, are protected so long as they act in discharge of their duty and are ignorant of any irregularity in the issuing of the process.

2. Judicial officer—A judicial officer, including justices of the peace, who has jurisdiction of the person and subject-matter is exempt from civil liability so long as he acts within his jurisdiction and in a judicial capacity. This applies not only to their judgments, but to all incidental process.

3. Where appellant was brought before a justice on a peace warrant, and it being late Saturday night and appellant very drunk, the justice without

**trial sent him to jail on a mittimus, Held—That though the Criminal Code does not authorize a commitment on a peace warrant before final trial, yet under the circumstances the justice did not act beyond his jurisdiction and is not civilly liable.**

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Hines.

This is an action by appellant against appellees, A. C. Mayes, R. R. Pickering and J. M. Pool, seeking damages for alleged false imprisonment. A demurrer was sustained to the petition as to Pickering and Pool and overruled as to Mayes. There was a trial as to Mayes, a verdict for defendant and an appeal to this court. The petition states in substance that appellees "wickedly, willfully, and without authority, falsely and maliciously imprisoned" appellant. It is stated that appellant was arrested by Pickering, the sheriff, on a warrant "corruptly" issued by Mayes, a justice of the peace, and committed to the charge of the jailer, Pool, by written order of defendant Mayes.

It is complained that the court erred in sustaining a demurrer to the petition and in dismissing it as to Pickering and Pool, and that the court erred on the trial of Mayes, both in giving and in refusing instructions.

The general rule as to ministerial officers is that if a process, whether a warrant for arrest or other process, is apparently regular and issues from a court having jurisdiction of the subject-matter, and the officer has no knowledge of any material irregularity or any illegality in the issuing of the process, he is protected in its execution. But it must always be understood that the protection extends only so long as he is in good faith in discharge of his duty under the process. Outside of this he must answer as a private citizen for any oppression or wrongdoing. It appears from the petition in this case that both Pickering and Pool were acting in good faith and in obedience to directions issued from a judicial officer of competent jurisdiction, which were fair upon their face and without any knowledge or intimation on the part of appellees of any illegality. This being the case the petition, under the rule just stated, failed to state a cause of action against either Pickering or Pool, and the demurrer as to them was properly sustained. (2d volume Hilliard on Torts, chapter 29, page 126; Cooley on Torts, 459.)

The general rule applicable to justices of the peace, as to all judicial officers, is that when the officer has jurisdiction of the person and of the subject-matter he is exempt from suit by a private individual for damages so long as he acts within his jurisdiction and in a judicial capacity. (2d volume Hilliard on Torts, chapter 28, page 108; Cooley on Torts, page 409.)

Judge Cooley in his work on Torts, page 408, in reference to this matter, says:

"Whenever, therefore, the State confers judicial powers upon an individual it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that, in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages." This rule "applies to the highest judge in the State or Nation, but it also applies to the lowest officer who sits as a court and tries petty causes, and it applies not in respect to their judgments merely, but to all process awarded by them for carrying their judgments into effect."

There are dicta in several cases in this State which tend to the conclusion that an action for damages will lie against a justice of the peace for acting corruptly while acting or deciding within his jurisdiction, as in the case of Revill, &c. v. Pettit, 3 Met., 319. That was a case where one justice of the peace assumed to hold an examining court alone and to commit to jail one charged with a felony, when the Criminal Code expressly requires that on a charge of felony two magistrates are required to hold an examining court, and to admit to bail or commit to prison. That was a clear case of the usurpation of a jurisdiction not pertaining to the office of magistrate, and such a case as did not call for the expression of an opinion as to whether the justice would have been answerable in damages

for corruption while acting clearly within his jurisdiction and in a judicial matter.

To apply the rule in the sense above stated the officer must be purely a judicial one. For example, it has been held that the sheriff and the judges of an election, in accepting or rejecting a vote, act in a quasi judicial capacity and may be held to answer in damages for rejecting a vote when actuated by impure or corrupt motives. (18 B. Monroe, 712, Morgan v. Dudley.)

The warrant issued in this case was a peace warrant taken out on oath as required by the Code. Appellant was arrested on the warrant and brought before appellee Mayes at between 11 and 12 o'clock on Saturday night. At the time he was so much under the influence of intoxicating spirits that he staggered in attempting to walk, and his articulation was so obstructed by the same cause that he could scarcely be understood when he attempted to speak. By reason of the lateness of the hour the justice issued a mittimus, in which it was stated that appellant refused to give bail, under which he was delivered to the jailer, and kept in custody until the following evening.

It is insisted for appellant that the justice should have endorsed on the mittimus the amount of bail required of appellant in order that he might have an opportunity to give the same after commitment, and that he should have been placed under guard instead of being sent to jail. The provisions of the Code, title 10 chapter 2, under which this proceeding was had, makes no provision for taking bond of the accused before or pending the final examination. Such an endorsement then would have been without authority and would have conferred no authority on anyone else to take the bond.

The next inquiry is, did the justice act without authority when he committed appellant to jail? There is in this chapter no provision for jailing or guarding one arrested on a peace warrant, except after final examination the accused may be sent to jail for three months by the proper tribunal or until the bond required of him is executed. But the authority to arrest, to try and to require bond necessarily implies that the accused may be restrained of his liberty, within a reasonable limit, pending or preparatory to such an examination. The law does not require a judicial officer to hold his court at all

hours of the night and day, nor does it require that he shall do violence to his conscience by holding an examining court on the Sabbath, although the proceeding of an examining court held on that day may be valid. Nor does the law require or permit such an officer to try one who is temporarily incapacitated by drink to attend to or understand the charge preferred against him. The situation was this: The hour, 11:30 p. m., Saturday, appellant brought before the justice on a warrant sworn out on the affidaivt of appellant's son, in which the son makes oath that appellant has threatened to take his life, and that it will be endangered so long as appellant is not restrained of his liberty. Appellant is crazed with drink, and manifests his dangerous character in the presence of the court by cursing an officer. What then was the justice to do? It was manifestly too late to try the accused before midnight, if he had been in condition, and the law does not compel the justice to hold his court on the Sabbath. Certainly the justice would not have been justified in turning appellant loose upon the community with the probability, as shown by the affidavit, that he would take the life of his son before morning. But, says counsel for appellant, he should have been placed under guard. For this there is no more authority than there is for committing to jail. In either case the authority must be derived from necessity, and by analogy follow the provisions of sections 323-324 of Criminal Code in cases of postponement of an examining trial; but in such case it is discretionary with the magistrate whether he will commit the accused to jail or put him under guard. If appellant had been carried before the justice without a warrant, even in the State of intoxication that he was when sent to jail, it would have been the duty of the magistrate to have sent him to jail until he was sober (Section 398 of Criminal Code). In such case there can be no pretense that an action would lie against the magistrate for so doing. Does it matter that the mittimus simply states that appellant refused and neglected to give bond, or that appellant was up on a warrant instead of being brought up without a warrant? If an action for damages would not lie in the one case, how can it lie in the other? There is not the slightest proof of oppression, corruption, or illegality in the action of the justice. He appears to have acted humanely and within his jurisdiction.

The law, as we have attempted to state it, will answer appellant's objection to the action of the court in refusing and in giving instructions. Several of appellant's instructions have no evidence to support them, and they are all at variance with the law as we have stated it.

Judgment affirmed.

L. Pepper, T. A. Lowry and Geo. W. Duvall for appellant.

F. W. Darby and Jas. R. Hewlett for appellees.

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## BANK LICK TURNPIKE CO. v. PHELPS, COUNTY JUDGE.

(Filed February 26, 1884.)

**1. Writ of prohibition can not issue to prevent an inferior court from making a merely erroneous decision or enforcing an erroneous judgment or order. It can be granted only to prohibit the court from proceeding in a matter out of its jurisdiction.**

**2. An act construed directing the county court to ascertain when a turnpike company was paying a greater dividend than 10 per cent. on its original capital stock and to reduce the toll until the dividends equalled 10 per cent. only.**

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

February 10, 1869, the general assembly passed an act to amend the charter of appellants, the Bank Lick Turnpike Co., the 4th section of which is as follows: "That the gate keepers are required to report in the months of July and January of each year to the Kenton County Court, under oath, the amount of tolls collected and due said company; and whenever it is ascertained that the road pays a greater dividend than ten per cent. per annum upon the original capital stock then the tolls are to be reduced until it nets ten per cent. only upon its stock; and the surveyor or president of said road shall report under oath to the county judge in January and July of each year with vouchers, and the cost of all repairs to said road."

In the petition filed by appellants, a general demurrer to which was sustained, it is alleged that before the passage of the act of 1869 the company had, under the authority of its original charter and amendments thereto, for the purpose of raising money to construct its road, issued and sold stock to

the amount of $40,000; that the reports required by section 4 of the act of 1869 have been made at the appointed time for five years or more before the commencement of this action, and that exceptions being filed by the county attorney to the one made in January, 1881, the court decided that the net receipts of tolls by the company were in excess of 10 per cent. per annum upon their capital stock, which, by an order of court made in April, 1877, had been estimated and fixed at $26,350, and, therefore, made an order reducing the tolls below the rates fixed by the directors of the company under authority of its charter.

It alleges that in fact the net income or receipts from the tolls have not at any time since the passage of the act of 1869 exceeded 10 per cent. per annum on their capital stock, even estimating it at the amount fixed by the county court, and that, as shown by reports made in July, 1881, and January, 1882, the net income for the year 1881 has been less than 10 per cent.

It is further alleged that the county judge claiming jurisdiction to determine the capital stock of the company and the right to control it in the matter of its expenditures in keeping up the road, has made orders reducing salaries that the directors have contracted to pay its officers and employes, refusing to allow in the account of expenses sums actually paid for necessary repairs, and including in the receipts accounts for tolls not collected and uncollectable.

The object of this action is to obtain from the Kenton Chancery Court a writ of prohibition enjoining the judge of the county court from proceeding under the order made in January, 1881, and the rule subsequently issued requiring the officers of the company to appear and answer for the alleged contempt in disobeying that order and perpetually prohibiting the county court from exercising jurisdiction to hear and determine exceptions to the correctness of the reports, and from assuming to order a reduction of tolls to be collected on the road according to its finding. The chancery court was also asked to vacate the order by which the county court fixed the capital stock upon which the stockholders of the company might receive dividends at $26,350.

By section 3 of the act of incorporation, passed February 6, 1839, it is provided that the capital stock of the company shall

be $40,000, and if that amount shall be ascertained to be insufficient to accomplish the object of the act the president and directors of the company may enlarge it to such an amount as may be deemed necessary and upon subscriptions therefor as they may think proper.

By the act amending the charter passed February 6, 1866, the company is empowered to issue additional stock not to exceed in amount $50,000. And by an amendment passed February 27, 1867, the company is authorized to increase the capital stock to any amount not exceeding $75,000. But both these acts have been repealed by the act of February 10, 1869.

By the term "original capital stock," used in the fourth section of the act of February 10, 1869, is clearly meant the amount of stock subscribed or issued and sold which has been actually expended for the accomplishment of the object of the charter, that is, the construction of the road. Therefore, what is the precise amount of capital stock thus defined, not being fixed by the charter, must be ascertained and determined otherwise. For though, as required by the act, the gatekeepers may report semi-annually the amount of tolls collected, and the surveyor or president report at the same time the cost of all repairs to the road, it is obvious that it could not be decided whether the road pays a greater dividend than 10 per cent. per annum upon the original capital stock without first ascertaining the amount of such original capital stock.

The provision which requires the tolls to be reduced whenever it is ascertained that the road pays a greater dividend than the amount allowed by law confers implied power upon the county court, to which tribunal the reports are to be made, to determine not only the amount of tolls collected and due the company and the cost of repairs, but also the amount of the original capital stock. Any other interpretation of the fourth section of the act would render it inoperative. For it would be useless to require reports of tolls and costs of repairs to the road to be made to the county court and the tolls to be regulated so that the original capital stock should net 10 per cent. only without giving that tribunal the power to determine whether or not a state of facts exist that authorize the reduction of tolls.

In our opinion the Kenton County Court has complete jurisdiction to ascertain semi-annually whether the road does pay a greater dividend than 10 per cent. per annum, and may inquire as to all the facts necessary to determine the question, and when in the language of the law it is ascertained that such is the case may make an order directing the tolls to be reduced within the limit required by the act.

Nor are we of the opinion the court has exceeded its jurisdiction in issuing a rule requiring the officers of the company to appear and answer for the alleged contempt in disobeying a previous order reducing the tolls.

The writ of prohibition asked for in this case can be granted only to prohibit the Kenton County Court from proceeding in a matter out of its jurisdiction.

It may be that the county court has erred in reducing the necessary salaries of the officers of the company below what is reasonable and just, or has required the company to account for more tolls than have been collected or are due, or has refused improperly to allow for necessary and legitimate expenses in keeping in repair the road. But all these subjects have to be considered by the county court in determining whether the tolls should be reduced or not and are within its jurisdiction. And, therefore, as the writ of prohibition can not be granted merely to prevent an inferior tribunal from deciding erroneously or from enforcing an erroneous judgment or order, the only remedy allowed generally in such cases is to appeal. That no provision has been made for appeal from the alleged erroneous orders of the county court in this case does not authorize a perversion of the purpose for which by law a writ of prohibition may be granted or its extension to cases in which it does not lie.

The judgment must be affirmed.

O'Hara & Bryan and A. C. Ellis for appellant.

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## PRYSE v. McGUIRE.

(Filed February 19, 1884.)

1. Vendor and vendee—Fraud—Where the vendor of land represents the title as clear and unincumbered, knowing at the time that there are defects in it, he can not defend himself from the consequences of such misrepre-

sentations by setting up that the vendee might have discovered the defects by examining the records.

2. Pleading—If the facts as alleged show fraud, it is not essential that they should be denominated, in terms, fraudulent.

3. Breach of warranty—In an action by the vendor of land against the vendee for the purchase money it is no defense for the latter to set up a defect in the title. He must look to the covenants of warranty and wait for an eviction (unless the vendor is insolvent or a nonresident). But if the vendor has never put the vendee in possession of the land that will be taken as a breach of the warranty, and the vendee may rely on it as a defense in an action for the purchase money.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellee, McGuire, sold and by deed, containing covenants of general warranty of title and possession, conveyed a large boundary of land, described by metes and bounds, to the appellant, Pryse, in consideration of $7,000 cash in hand, and $10,558.66 secured by note of even date with the deed and due twelve months after date, a lien being retained for its payment.

McGuire brought this action on the note to enforce the lien. He averred the execution of the contract, the acceptance and registration of the deed and the nonpayment of the note, concluding with a proper prayer.

Pryse answered, admitting the execution of the note, delivery and acceptance of the deed, which he had recorded, and pleaded substantially that after deducting the twenty tracts described in the deed and excluded from it as having been previously sold and then occupied by others, McGuire represented to him that he had a good and perfect title, unincumbered to the residue, 8,461 acres embraced and conveyed by the deed; that he relied upon the representations and assurances of McGuire, accepted the deed and paid him $7,000 of the purchase money and executed the note sued on; that after this suit was brought, and for the first time, he examined McGuire's title and found that he had no title or possession of several portions of the land embraced by the deed, and not within any of the exclusions of the deed.

Those portions are particularly described, the names of the alleged owners and possessors are set forth, the character of their

title and the kind and length of their possession is so specifically alleged as to show lawful title in them, and the averment made that they are the real owners and that McGuire had leased to Casto the mineral privileges of the land sold to Pryse for a period of thirty-five years, and only two or three years of the lease, which was duly recorded, had expired, all of which McGuire knew but failed to disclose when he sold the land to Pryse and when the latter accepted the deed. Pryse prayed judgment for damages and counterclaim to the extent of the value of the land and lease, whose sale, possession and ownership had been suppressed from him by McGuire.

To each paragraph and the whole of this answer a general demurrer was filed by McGuire and sustained by the court. Pryse failing to plead further, a judgment was rendered against him for the amount of the note, subject to a small credit, and for a sale of the land to satisfy the lien retained in the deed. From that judgment Pryse prosecuted this appeal.

It is suggested in argument that Pryse, by examining the county court records, could have discovered before he accepted the deed the titles and lease described in his anwser, and as he does not use the term fraud in reference to McGuire's representations, his answer is insufficient in law or equity as a defense. But as this court said in Young v. Hopkins, &c., 6 Mon., 23: "It is a bad defense in the mouth of misrepresentation of facts to say that the vendee might have discovered these falsehoods by using due caution and diligence, and, therefore, he ought to be excused."

On the other idea that the word fraud or its equivalent is necessary to the charge of fraud, we are of a different opinion. For if the facts be true as alleged, and they must be so treated on demurrer, and McGuire knew of their existence and made material statements to Pryse in conflict with them which misled him, it is not necessary to denominate his acts as fraudulent, for the facts themselves constitute substantive fraud. Where the facts show fraud the law will presume the animus.

It is not doubted that Pryse must rely upon the covenants of warranty contained in the deed, because neither nonresidency, nor insolvency of the vendor, nor any other equitable ground is relied on which would authorize the interposition of a court of

equity before breach of the warranty. This case, though, presents a different question from any of those questions determined by the numerous cases cited by appellee's counsel. According to the facts alleged in the answer Pryse was never put in possession of the portions of the land alleged to be owned and possessed by others, and in fact could not be placed in possession thereof by McGuire.

As the legal effect of McGuire's covenants of warranty is that Pryse should quietly enjoy the possession that no incumbrances, such as mortgages or leases, were upon the land, and that McGuire would warrant and defend the title, the question arises upon the facts averred in the answer, whether there has been a breach of the warranty and necessarily consequent damages.

There was no eviction of Pryse from the possession of the land whose value he claims as a counterclaim, and there could be none because McGuire never put him in possession, which was a breach of that part of the warranty for quiet enjoyment. The alleged failure to place Pryse in possession of the parcels described in the answer is accompanied by averments, if true, which demonstrate that he has no title to them, and without possession or title Pryse will not be required to aver insolvency or other equitable grounds or wait for a judicial eviction which can not be had so long as the status of the possession and title remain as alleged. It is, therefore, clear that the answer shows the warranty to have been broken, and the defendant damaged thereby. According to the case of Butt v. Riffe, 78 Ky., 553-6, and the provisions of the Civil Code which authorizes the plea of counterclaim in cases of this character, the answer of Pryse presented a valid defense, because it exhibits a breach of the covenant "for which the appellee must answer in damages."

Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

Isaac N. Cardwell for appellant.

C. F. & A. R. Burnam for appellee.

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## QUINLAN v. CALLAHAN.

(Filed February 28, 1884.)

**Taxation—Sale—Notice—Demand—Auditor's agents act—The right of the State to her taxes is not lost by the delay or neglect of her officers, and**

**although the land has passed into the hands of an innocent purchaser, he holds it subject to a lien for all taxes unpaid by the former owner. But after such purchaser has acquired it, it can not be sold without first making demand of or giving notice to him.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

While back taxes may be collected, although the land upon which the lien exists has passed into the hands of an innocent purchaser, our attention has not been called to any principle or rule of taxation applicable to our system of imposing and collecting taxes by which the land of the bona fide purchaser may be sold without a demand for the taxes or without notifying him of the existence of the lien by reason of the nonpayment of taxes by his vendor. The advertisement of tax sales is to notify the owner that he may pay the taxes and release his estate from the lien as well as to invite bidders if a sale should become necessary.

The sale was made in this case on the 14th of May, 1881, to pay the taxes due and unpaid for the years 1875, 1876, 1877 and 1878, and the lot in controversy advertised and sold as the property of Rachel Mendall. The appellee, John Callahan, was at the time of the sale the owner of the lot of ground by purchase from one Kilpatrick and invested with the legal title. His purchase was made in September, 1880, and his title not questioned except by the appellant, Margaret Quinlan, who purchased of Grauman, the vendee of the auditor's agent. Grauman obtained a conveyance from the auditor and then sold and conveyed the lot to the appellant. The auditor supposed it was the property of Rachel Mendall, as the evidences of her liability for the tax were in his possession, and in pursuance of the statute ordered or required the sale to be by his agent.

The claim was for back taxes and assessed against a party who, at the time, was the legal owner, but who had divested himself of title before the sale was made.

The owner, who was the appellee, had no notice of the existence of the lien or demand made of the taxes due by those of whom he had purchased. His lot is sold to satisfy a lien of which he had no knowledge, and by an examination of the records of his county or the county in which the lot is located no

information could have been obtained as to the claim of the State upon the property.

The land of the appellee, Callahan, is sold to discharge the taxes that are due not from him, but from a party who has no right, title or interest in it. There has been no neglect of duty on the part of the owner of the lot sold, and, therefore, the greater the necessity of notice to him of the default of the original owner that he may pay the tax and save his land. "One object of advertising tax sales is to give full notice to the proprietor and furnish him with every facility for the voluntary payment of the tax before resort is had to coercive means, etc. It follows that any neglect of the officer which deprives the owners and bidders of that full information which the law intended to give them is fatal to the validity of the tax sale." (Blackwell on Tax Titles, page 214.)

The second section of the act, entitled "An act to amend the revenue laws of the State," approved May 6, 1880, should not be so construed as dispensing with the necessity of notice to one who has purchased the land, after the lien for the taxes accrued when the time for the collection of the taxes in the ordinary mode has expired, and a sale without notice or demand in such cases is, as to the innocent purchaser, void. The right to collect taxes on the part of the State is not lost by the delay or neglect of the officer to collect it in the usual mode, and the transmutation of title being so common with reference to real estate, and such liens not being susceptible of discovery in the examination of titles, there is no reason or necessity for depriving the citizen of his property without citation or notice, and such an attachment must be held as in violation of his constitutional rights. While the power to levy and collect taxes is an incident to sovereignty, it is also the object of a government like ours to protect the private property of the citizen, and to authorize by statutes his property to be sold for the failure on the part of his neighbor to discharge a duty owing the State is an exercise of arbitrary power, and takes from him the right to the protection of private property guaranteed to him by the Constitution. The answer, therefore, that his property was sold for back taxes assessed against another without notice or demand was sufficient, if true, to defeat the recovery. No title passed to the purchaser under

such a state of case. It is not necessary to determine the other questions named.

Judgment affirmed.

J. F. Bullitt & Son for appellant.

F. T. For, Jr., for appellee.

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## L., C. & L. R. R. CO. v. SULLIVAN.

(Filed February 28, 1884.)

1. Negligence—Drunkenness—Railroad companies may rightfully eject from their trains anyone who refuses to pay his fare, but in the exercise of this right due regard must be had to the physical condition at the time of the person so ejected, and if he is drunk he is not to be put off in such place as would, on account of his condition, endanger his life or health.

2. An assignment of error that appellant was not allowed to prove certain facts is insufficient unless it is also alleged that a witness would have stated those facts.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellee to recover damages for personal injuries sustained on account of being unlawfully, wrongfully, and by the gross negligence of the conductor of appellant's train of cars, ejected therefrom and exposed to freezing weather while in a helpless condition.

From the evidence it appears that appellant, on the day he was ejected from the train, which was the 25th of December, walked from Cropper's Station, on the line of appellant's road, where he was staying temporarily, to Christiansburg, another station, where he obtained whisky, and, as the evidence satisfactorily shows, became so intoxicated as to stagger when walking, and was in that condition when, between 3 and 4 o'clock in the afternoon, he got on the train for the purpose of returning to the first-named station, distant two and one-half miles; that when the train had gone between one-half and three-fourths of a mile he was approached by the conductor in the baggage car, where he had improperly gone, and requested to pay his fare, which was twenty-five cents, and refusing, or, as he says, being unable to do so, the train was stopped, and he was compelled to leave it. He states that when he stepped from the car he fell down upon the snow, which other witnesses

testify was at the time eight or ten inches deep, and remained there until next morning, not remembering what occurred in the meantime. There is some conflict in the testimony as to the precise place the train left him, and also whether he was at the time standing or lying down, one of the witnesses, a brakeman, testifying that he was standing, and said to him, "You can kill me if you like." But about one hour and a half afterwards, near the time for the train going towards Christiansburg to pass, and about two hundred and fifty yards towards Cropper's from the place where the conductor testifies he was put off the train, he was discovered by one of the witnesses lying across the track, helpless and nearly unconscious, with a quart bottle nearly full of whisky, who pulled him off the track, but being unable to remove him from the place left him.

By reason of his exposure for such length of time to the cold weather, the temperature of which was, as stated by several witnesses, between eight and ten degrees below zero, his feet, hands, shoulder, and parts of his legs and one arm were frozen, causing intense suffering and confinement for several months, and the necessary amputation of his toes, several of his fingers, and part of his heel.

Judgment having been rendered in accordance with the verdict of the jury for $5,000 the railroad company has appealed, and assign various errors.

One of the grounds for a new trial was that the damages assessed by the jury are excessive, and appear to have been given under the influence of prejudice.

As this ground is not assigned as an error it can not be considered on this appeal. Nor can we consider the fourth assignment, which is that the court erred in overruling the motion for a new trial. For, as has been heretofore held, it is too general to raise any question for decision.

The first error assigned is that the court improperly excluded evidence as set forth in the grounds for a new trial.

The first of the grounds thus in general terms referred to in the assignment is that appellant was not permitted to prove by the conductor that he would not have put appellee off the train if he had known he could not walk, or was mentally or physically in a helpless condition.

Even if the evidence had been relative and competent it can not be now considered by this court, because counsel having failed to aver that the witness would so testify, it never was in fact passed on by the lower court.

For the same reason this court can not consider the other ground for a new trial, viz: That the court refused to allow appellant to prove by appellee that he was a dissipated man, and that he was in the habit of or frequently laid out all night.

The second assignment is that the court erred in refusing to render a judgment for defendant upon the special verdicts of the jury.

As this, as well as the third assignment which refers to the action of the court in giving and refusing instructions to the jury, involve the question of appellee's right to maintain the action at all, we will consider them together.

Instruction No. 1, given at the instance of appellee, is as follows: "Although the jury may believe from the evidence that plaintiff got on defendant's cars to go from Christiansburg to Cropper's Station, and that he had no ticket, and when his fare was demanded he said he had no money and neither paid his fare nor delivered to the conductor a ticket, yet if they further believe from the evidence that he was then in such a state of intoxication as to render him mentally or physically incapable of taking care of himself, and he was then in such a helpless condition that to put him off said train would necessarily expose him to death, or great danger of being frozen, and that defendant's agents in charge of said train at the time knew plaintiff's helpless condition and the danger he would be exposed to, being then and there ejected from said train, then they should find for plaintiff such compensatory damages as he may have sustained thereby as were the necessary and proximate results of his having been put off the train, not exceeding $25,000."

Two instructions were asked by appellant, but as one of them was given so modified as to harmonize with the one given at the instance of appellee, and the one refused is the reverse of it, we need not quote them.

The following facts were found by special verdicts of the jury:

1st. That though requested, appellant, while on the train, refused to either pay his fare or deliver to the conductor his ticket.

2d. He was at the time intoxicated and in such a helpless condition as to be incapable of taking care of himself, and the conductor knew it when he put him off.

3d. The conductor, in ejecting him from the train, used no more force than was necessary for that purpose.

From the facts found by the jury, and the evidence in the case, it is clear that even slight diligence and care on the part of the conductor would have enabled him to prevent the injury done to appellant.

It is clear also that the act of the conductor was within the scope and in the course of his general authority, and hence appellant must be held responsible for whatever liability attaches thereto.

It being thus established that at the time appellee was put off the train he was himself a trespasser, and that the calamity which befell him was brought on, in part at least, by his own conduct in getting drunk, the question that arises is whether the act of the conductor is to be held in law, as it is in fact, gross negligence for which appellant may be held liable.

The right generally of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor may be conceded. But does it follow that this right may be exercised in such manner, under such circumstances, or against a person in such mental or physical condition as that death or serious bodily harm will necessarily or even probably result from putting him off?

It is true that appellee by refusing to pay his fare became technically a trespasser. But it is well settled that a party may in some cases recover for the gross negligence of another, notwithstanding he may have been a trespasser upon the rights of the other at the time he received the injury.

"Negligence or misconduct on the part of the plaintiff does not prevent him from recovering damages in those cases where his negligence or misconduct has not been the immediate co-operating cause of the injury he complains of" (1 Addison on Torts, 495). The rule by which to determine the right of recovery in such cases is that when the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff is remote, consisting of some act or omission not oc-

curring at the time of the injury, the action can be maintained although the plaintiff is not without fault himself (Kerwhacker v. C., C. & C. R. R. Co., 3 Ohio St., 172; Isbel v. New York & N. H. R. Co., 27 Conn., 393). And by this court it has been repeatedly held that, although the plaintiff suing for an injury resulting from gross negligence may have himself been guilty of negligence, nevertheless, if the injury might have been avoided by the proper care of the defendant, such co-operating negligence of the plaintiff will not exonerate the defendant.

In the able opinion delivered in a leading case of Isbel v. The New York & N. H. R. R. Co., just cited, the court said: "A remote fault in one party does not, of course, dispense with the care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demands this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Premature remedies must, therefore, always be proportioned to the case in its peculiar circumstances—to the imminency of the danger, the evil to be avoided, and the means at hand to avoid it. And herein is no novel or strange doctrine of the law, it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a door yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull dog; still he is a trespasser, and if he had kept away would have received no hurt. Nevertheless is not the owner of the dog liable? A person is hunting in the woods of, or crossing a pasture of, his neighbor and is wounded by a concealed gun. Is he in such case remediless because he is there without consent? Or an intoxicated man is lying in the traveled part of a highway, helpless if not unconscious; must I not use care to avoid him? May I say that he has no right to incumber the highway, and, therefore, carelessly continue my progress regardless of consequences? Or if such man has taken refuge in a field of grass, or hedge of bushes, may the owner of the field, knowing the fact, continue to mow on, or fell trees as if it was not so? Or

if the intoxicated man has entered a private lane or by-way, and will be run over if the owner does not stop his team, which is passing through it, must he not stop them? It must be so that an unnecessary injury negligently inflicted in these and kindred cases is wrong and, therefore, unlawful. If assailed, a man may do what is necessary to defend himself against the assault, but he may not become himself the assailant. He may defend his property, but he may not in doing it make use of unnecessary violence, and cease to use all care as to the injury he inflicts. The duties which men owe to each other in society are mutual and reciprocal, and faulty conduct on the part of another never absolves one from their obligations, though such conduct may materially affect the application of the rule by which this duty is to be determined in the particular instance."

The principles laid down and the illustrations given in the opinion first quoted from are correct and applicable to this case.

In the case of Johnson v. The C., R. I. & P. R. Co., 58 Iowa, 348, the plaintiff was removed from the waiting room of a railroad station by the agent of the defendant. His shoulder was dislocated either from a fall from the door, out of which the agent pushed him, or by a fall after he landed on the platform. The plaintiff was not in the waiting room awaiting an outgoing train to take passage, or for any other purpose for which a waiting room at a station is kept open to the public. He had no right to remain there after being requested by the agent to leave it. He refused the request to leave before any violence was used towards him, and was drunk and disorderly. In the opinion delivered in that case the court said: "The rule that carriers of passengers are liable for the neglect or wrongful acts of their servants or employes does not always depend upon the fact that the carrier owes a duty or is under some obligations to the party injured. When a person is found upon a train who refuses to pay his fare the company owes him no duty, and he may be removed; but if in removing him he is wrongfully injured by personal violence, or by being thrown from the train when in motion, or the like, he may recover from the company for his injuries. This is no more than the application of the ancient rule that if one person came into the

dwelling house of another without right, after requesting him to depart and his refusal to comply with the request, he may be removed by gently laying hands upon him and using such force as is reasonably necessary to affect the object. But if excessive force be used the action is a wrongful assault."

The case of Kline v. C. P. R. R. Co., 37 Cal., 400, was where a boy got upon a morning train as it passed his residence with intent to enjoy a free ride for a short distance. The conductor, either by threatening or pushing, caused him to fall from the train while in motion, and a car wheel to run over his leg, crushing it so as to necessitate amputation. The court held that "the conductor doubtless had the right to eject him by force, if force was necessary, but he was bound to exercise the right with ordinary care and prudence, and he had no right to eject him under circumstances which would endanger his personal safety. If the train was going at a speed which would render it unsafe for him to leave the car it was the duty of the conductor, if determined to put him off, to stop or slow up sufficiently to allow him to descend in safety, by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet, if it was an accomplished fact before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was, in the sense of the rule under consideration, only its remote cause, and did not, therefore, absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train."

In the case of Wigmire v. Wolfe, 52 Iowa, 533, the plaintiff's intestate, Dunn, was an habitual frequenter of the saloon kept by the defendant, who sold him intoxicating liquor, which caused him to drink, and while he was in a state of helpless intoxication the defendant expelled him from his saloon at a late hour of the night, and Dunn, being thus intoxicated, died of cold and exposure. The court held: "If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care. If after

the company should be guilty of negligence, whereby the exposed person should be injured, the negligence of the company would be deemed the proximate cause of the injury. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious or even helpless, the defendant can not escape liability on account of Dunn's negligence prior to the wrongful acts, whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated."

That case is so nearly like this that the reasoning which may be applied to one is applicable to the other, and if correct, as we believe it is, it must be regarded decisive of the question involved here.

If in defense of either person or property a party uses more force than is necessary, the defense degenerates into aggression, and the party becomes a wrongdoer and liable for the unnecessary injury inflicted, whether done maliciously or negligently. The language of the law is molliter manus imposuit.

We do not understand this injunction as applying merely to the character of weapons that may be used in defense of the person or the degree of propelling force applied in removing a trespasser from a party's premises. But it is intended to apply and govern as to the manner, the circumstances and condition of the parties in which the right to protect one's person or property may be exercised. Thus force might be applied legally to a strong, vigorous man, when the danger to the person was imminent, or the value of property or rights threatened or invaded great, which would become wanton cruelty or gross negligence in the case of a child, imbecile or helpless, drunken man.

In this case, if the evidence and the special findings of the jury are to be believed, appellant's agent and employe, if he did not use more actual force than was necessary to expel appellee from the train, did use it under circumstances and at a time when the consequences ordinarily would be as injurious as when in an attempt to remove a trespasser from his dwelling house the owner should shove him from an upper story, or lead him into a pit-fall or well, or when a person is pushed off a fast moving train. In every such case the party would be

justly chargeable with negligence and held liable therefor, the fault or negligence of the person injured being remote, and, therefore, affording no defense to an action brought for the injury resulting.

Applying these principles, which are in accordance with the authorities and sustained by the necessities of society and the analogies of the law, the instruction of the court which we have quoted was right, and it was not error to overrule the motion to render judgment for appellant upon the findings of the jury.

The judgment is affirmed.

A. Barnett and French & Harwood for appellant.

Bullock & Beckham for appellee.

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## TRUSTEES OF BELLEVIEW v. HOHN & TRAPP.

(Filed March 8, 1884.)

**Municipal corporation—Improvement of streets—Where the trustees of a town made a contract with A for the improvement of the streets at the expense of abutting lot owners, the town not to be liable in any event, and it being afterwards determined by the courts that the trustees had no power to make such contract, and, therefore, the lot owners were not liable, this suit was brought to recover from the city for the work done and it is now Held—First, that the mere fact that the town was benefited by the improvements does not make it liable to pay therefor; second, nor does the fact that the trustees acted without authority in making the contract binding the lot owners; third, in such suit facts must be alleged showing that the ordinance was passed in pursuance of the charter.**

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

This action is based on a written contract alleged to have been made with the trustees of the town of Belleview and the appellees for the improvement of certain streets within that town.

By the terms of the contract the appellees agreed and bound themselves not to look to the town in any event for the payment of the money for the work to be performed, and recovered, as we infer, in the court below by reason of the averment in their petition or reply; that the contract was entered into with the express understanding that the appellants, the trustees of the town, would take such steps as would make the

property holders liable. By the original contract they were to look alone to the abutting property holders for their pay, and not to the defendants. It is also alleged that the town received the work and must, therefore, pay for it, as the owners of the abutting property were not responsible.

In a proceeding heretofore in this court, in the case of Doyle, &c. v. The Trustees of the Town, 1 Ky. Law Rep., 168, this court held that the trustees had no power to cause the improvements to be made at the cost of the owners of the adjacent property, and that the proceedings by the trustees to subject such property under special assessments made for that purpose were null and void. The appellees, who performed the work, are now insisting upon their right to recover of the city because the trustees had no authority to make such a contract. The doctrine recognized in the case of Murphy v. The City of Louisville, 9 Bush, 189, which follows all the modern authorities in regard to contracts entered into by municipal corporations, must be regarded as decisive of this case. "It is a fundamental principle," says Judge Dillon, "that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract, etc." Those dealing with an agent of the corporation must know the nature and extent of his authority. (1 Dillon on Mun. Cor., section 372.)

In Murphy v. The City of Louisville, supra, the same rule is laid down, and in that case it is further held that "when one has made a valid and binding contract with a corporation through its agents, and has suffered loss by the neglect of the corporation to do some act or discharge some duty with reference to the contract, of which the contracting party is not required to take notice, the corporation is liable." The appellees knew, or must, as a matter of law, be presumed to have known, that appellant, by its agents, could make no contract by which the lot owners could be made responsible; and, besides, there is no allegation in any pleading showing what the requirements of the charter of the town are touching the improvement of streets, or that the ordinance was passed in accordance with the provisions of the charter. If an ordinance was passed authorizing improvements it must be shown by specified aver-

ments that in the exercise of the power the terms of the charter were followed. In order for the court to know that an ordinance was properly passed it must appear that it was in pursuance of the charter, and to do this the facts must be stated.

The contract was void so far as it attempted to make the lot owners responsible, and there is no implied promise by the city to pay, because the lot owners were never bound. This fact appellees knew when they made the contract. That contract is in writing and by its terms the appellant, the town, is in no event to become responsible. Neither fraud nor mistake are alleged, and if such an averment had been made it can afford no relief as against the appellant. If the reception of work done under a void contract or its ratification by the town makes it responsible, then the provisions of its charter may be disregarded in every instance where the city has derived benefits from improvements made within its boundary, although its authorized agents may have failed when making the contract or passing the ordinance to comply with any of the requirements of the charter. If the town is made responsible by reason of its inherent power to improve streets, then it follows that such a power must exist with reference to all improvements conducive to the welfare of the city and the necessities of those living within the corporate limits.

The duties and powers of municipal corporations are prescribed by statute, and to make them liable like natural persons would be to license those who are intrusted with corporate control to place onerous burdens upon the inhabitants, in the way of taxation and otherwise, regardless of the powers and restrictions found in the charter, and by which alone the rights of the corporation must be determined.

Courts have found it necessary to execute the powers expressly granted and to refuse to make corporations liable upon implied promises by reason of benefits received. This is done for the protection of the inhabitants of the corporation, and because the only power the corporation has is from the law creating it, and instead of requiring a more liberal rule the courts are induced to hold corporations and their agents within the letter of their grant. We think, upon the pleadings, the appellants were entitled to a judgment. While it may be that

the town ought to pay this debt, the same argument would apply to every contract made by the agents of a corporation, although they have exceeded their authority. Judgment reversed and cause remanded for proceedings consistent with this opinion.

T. P. McKibben and Nelson & Washington for appellants.

L. J. Crawford for appellees.

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## JOHNSON v. WILLIAMS.

(Filed March 15, 1884.)

**Supersedeas, effect of—One who has obtained a judgment which has been superseded and bond duly executed can not, while the supersedeas is still in force, bring an action on his judgment and take out an attachment. The execution of the supersedeas suspends all proceedings for the enforcement of the judgment.**

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hines.

Appellee, having a judgment in the court below against appellant for some $2,600, from which an appeal was taken to this court, the collection of the judgment suspended by supersedeas, brought the action at bar, sought and obtained an attachment against the property of appellant.

The question is whether the court below properly entertained the action? We are of the opinion that it did not. On an appeal to this court the unsuccessful party in the court below may execute a supersedeas bond with security satisfactory to the clerk, which operates, on the issuing of the supersedeas, to suspend all proceedings for the collection or enforcement of the judgment below; or the appellant may neglect to execute a supersedeas, in which case the appellee may proceed in the court below for the enforcement of his judgment as if no appeal had been taken. So long as the bond thus executed is sufficient to secure appellee he has not only no right to harrass appellant with another suit about the same subject-matter, but he has no power to do so. If appellee for any reason deems the bond insufficient for the purpose of securing him, he has his remedy under section 750 of the Civil Code, which provides that he may apply to this court in term time, or to one of its

judges in vacation and have the supersedeas discharged or satisfactory bond executed. If the supersedeas is discharged "executions and other proceedings for enforcing the judgment may be immediately taken, as if no supersedeas had been issued." Here is a remedy that is speedy, adequate and complete; and being so, it must be considered as exclusive of any and all others. It was intended that the Civil Code should provide as complete a system of pleading and practice as possible, and while it does not, and, in the nature of things could not, cover the whole field, it may be safely asserted that whenever it provides a complete, speedy and adequate remedy, as in this case, it is exclusive of every other.

If it were allowable to proceed to collection or to enforce a judgment pending an appeal and supersedeas the remedy adopted, that is attachment, is not the proper one. The remedy would be, if the case is treated as if there was no supersedeas, to first issue an execution and on the return of "no property" a proceeding in equity under sections 439-441 might be instituted and an attachment obtained. Section 194 provides for the obtention of an attachment "at or after the commencement of an action," while sections 439 and 441 apply to the enforcement of judgments.

Judgment reversed and cause remanded, with direction to dismiss the petition.

Nelson & Washington for appellant.

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## EMERSON, FISHER & CO. v. DYE, &c.

(Filed March 13, 1884.)

**1. Practice—Appeal from Superior Court—On an appeal to Court of Appeals from Superior Court no assignment of errors or schedule in addition to or different from that used on the trial in the later court will be allowed. The appeal must be tried on the identical record used in Superior Court.**

**2. Appeal—Tax on—Dismissal—If clerk fails to require payment of tax on such appeal he is personally liable for it to the State. But the failure to pay it is no ground for dismissing the appeal.**

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hargis.

This is an appeal from a judgment of the Superior Court reversing the judgment of the lower court, the appellants here having been appellees in the Superior Court. They did not file any statement of parties or assignment of errors, and it is

alleged failed to pay tax on the appeal to this court. For these reasons the appellees, who filed a statement of parties and assignment of errors on the appeal to the Superior Court, move to dismiss the present appeal from that court. The motion must be overruled on each ground: First, because section 8 of the "act establishing a Superior Court," among other things, provides: "Whenever an appeal is granted from the Superior Court to the Court of Appeals the clerk shall transfer the case from the docket of the Superior Court to that of the Court of Appeals, and the same record upon which the case was tried in the Superior Court shall be used in the Court of Appeals."

This provision does not allow any additional or different record to be used in this court upon an appeal from the Superior Court than was used in that tribunal. And the statement of parties, schedules and assignment of error must be treated as a part of the record within the meaning and practical necessity of the section extracted from, otherwise the Superior Court might correctly decide a case on the record before it, but upon an appeal to this court, although the law requires the same record to be used, on a new and dissimilar assignment of errors, the Superior Court had no power to consider, reverse its judgment, lawful and unobjectionable when rendered. Such a result would be "confusion worse confounded," and no rule of practice that might produce it will be adopted by this court. The case as tried by the Superior Court will be tried by this court.

It is the duty of the clerk to require the tax to be paid before he grants the appeal or files the record, but if he does not do this it will, while he is responsible to the State for the tax precisely as if he had done his duty, furnish no ground for dismissing an appeal from the Superior Court. The several motions are, therefore, denied.

Perkins & Hallam for appellants.

R. W. Nelson for appellees.

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## CROMEY, TRUSTEE, &c. v. BULL, &c.

(Filed March 6, 1883.)

1. Trustee—Equity will control a trustee even though he has been given the largest discretion by the testator and will not suffer him to abuse his trust, or refuse to exercise it or act fraudulently in it.

**2. Investments—Trustee must use ordinary care and prudence in selecting investments for the trust fund, and if after this is done the security is lost the loss falls on the estate and not on him.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

John Bull, of Louisville, died some years since, leaving surviving him his widow and four infant children. He was the owner of a large estate, including real estate and personalty, all of which he disposed of by a last will and testament that was after his death admitted to probate in the Jefferson County Court. He left his widow an annuity of $12,000 and gave to his children, with certain limitations and restrictions, the balance of his estate. At the time of his death, and for years prior thereto, he was engaged in the business of making and selling patent medicines, and by certain provisions of his will empowered his executor or his successor to continue this business for the benefit of his estate, and from a clause of the will relating to the income arising from the patent medicine business springs the questions that are made prominent by this appeal. By the second clause of the will he devises to his executor, Thomas L. Jefferson, for and upon the trusts thereafter named, all of his estate, real, personal and mixed.

By the third clause he devises to his executor in trust for his son, Edward, during his life certain real estate, the executor to pay over to him in quarterly payments the net proceeds of the rents and profits. At the death of Edward the unexpended rents and profits and the estate devised to him is to pass to his descendants.

By subsequent clauses of the will he places similar limitations and restrictions on the property devised to his other children.

Clause 10 provides: "All the balance of my estate, real, personal and mixed, subject to the charge made in the ninth clause (which is a charge for the benefit of his wife, securing her the annuity) hereof and all the accumulations thereof, as hereinafter provided for, are to be held undivided by my said executor in trust for my four children above named, upon the same conditions and uses set forth in the third clause hereof, and with like restrictions upon alienation and encumbrance, and with each and every part of said clause applying thereto as fully as

if the same has been fully repeated and set forth, and so far as my two daughters are concerned with further like restrictions," etc. The children are to hold this residuary estate "in precisely the same manner and for the same uses and trusts as they hold the property specifically devised to them hereinbefore, and that my said four children shall have the same and no other rights in and powers over their respective interests in the residuary than they have over the property specifically devised to them in trust." The meaning of this is that in the third clause he had given the estate specifically devised to Edward for life, remainder to his descendants, and as to the residuary the trustee was to hold it for his children in the same manner. His entire estate was devised in trust to his children for life, remainder to their descendants; and if none, to the survivors, etc. The children were entitled to the income to be paid them by the trustee and no more.

In fifteenth clause of the will, the testator having required his executor to continue the business of making and selling his medicines, undertakes to direct him as to the disposition he is to make of the profits.

The income arising from these medicines amounted to sixty or seventy thousand dollars annually, and the intention of the testator, or rather the extent of the power conferred upon the executor in disposing of it to the children, is the principal question involved in this controversy.

It is maintained by the guardian ad litem for the grandchildren of the testator that they have an interest in this income, and the trustee has no power to give to their parents, who are the children of the testator, more of the income than their necessities demand, or that the chancellor, regardless of the question of mala fides on the part of the trustee, has the power to say to the trustee, you are giving to the children more of the income than you should give, and I, therefore, direct you to give a less sum. The children, on the other hand, maintain that, in the absence of fraud or bad faith on the part of the executor, the chancellor can not control his discretion; that under the fifteenth clause the trustee may give to each child his entire portion of the income, if in his discretion he thinks the child should have it. The fifteenth clause reads: "The

profits arising from the business and proceeds of any final sale of the same (the patent medicine) shall form a trust fund in the hands of my executor for the use of my four children, and be held under the same trusts and with like limitations and restrictions, and charge in favor of my wife as my real estate." This means that this fund shall be subject to the payment of the widow's annuity, as the residuary estate is; in other words, the widow has a lien upon it for the amount to be paid her. The testator then proceeds: "My executor may, in his discretion, pay out of said profits, as they accumulate, to any of my children the whole or a part of their portion of the same, as he shall deem proper in view of their necessities or capacity to use the same advantageously in business, or he may invest the same in real estate to be held in like trusts, and in all respects as the real estate herein provided in clause ten hereof, or he may use the same in improving any real estate held under this will, or invest it in any other way that to him may seem best, and his discretion therein shall not be questioned or controlled, but all such investments shall be held under like trusts as the real estate herein devised. Any money paid to any of my children under the power granted in this clause must be paid to said child or children in person and in no other way."

The executor, Thomas L. Jefferson, accepted the trust, but resigned his position in January, 1879, and when this was done the widow and children appeared in court and selected William Cromey, the present appellee, trustee as provided by the twelfth clause of the will.

The construction of the fifteenth clause of the will was made necessary, by reason of the petition filed by the trutsee, for a settlement of his accounts and the resistance by the grandchildren, those entitled in remainder, to certain acts of the trustee in the exercise of the powers conferred on him by this particular provision of this instrument.

The grandchildren fear that the trustee may deprive them of any part of the income from this business of the manufacture and sale of the medicines by giving to their parents more of that income than their necessities require. That courts of equity can and will interfere to prevent the improper exercise of a discretionary power is a doctrine well understood. When

the trustee acts fraudulently or abuses the power confided to his discretion, by refusing to execute the trust, or in the attempt to exercise it does that which is unreasonable and calculated to defeat the purpose of its creation, the chancellor will interfere at the instance of the parties in interest for the preservation of the trust estate and will see that the trustee discharges his duties as such. In the case of Bohon v. Barrett, 79 Ky., 408, the trustee declined to execute the trust and the chancellor said to him, you must execute it, although a discretionary power was conferred. So in the case before us, if Cromey had, in the exercise of his discretion, declined to make any advancements to these children out of the income the chancellor would have compelled him to have given them at least so much of the fund as was necessary for their comfortable support.

It is difficult in fact to create a trust where the trustee has such unlimited power over the trust property as to preclude the chancellor from controlling his action, when his conduct is such as to indicate a palpable or fraudulent abuse of his power to the injury of the parties in interest. To say that the chancellor had no control over such a fiduciary would be to vest the trustee not only with the absolute fee, but with the beneficial interest in the trust estate. Conceding the doctrine to be as contended by counsel for the appellee, and we see no reason to question its correctness, and still it can not be applied to the case before us.

"In the nature of things," says Perry on Trusts, "only very general rules can be laid down upon a subject where so much must depend upon the facts of each individual case," recognizing the general doctrine in regard to the power of courts of equity over trustees and trust estates, has there been such an abuse of power on the part of Cromey or such an arbitrary and unreasonable discharge of his duties as trustee as requires the chancellor to interfere in behalf of the grandchildren, who are the beneficiaries after the termination of the life estate of their parents? In order to a correct determination of this question it is not only proper, but necessary, to ascertain what powers the testator intended to confer upon the executor and trustee. He had secured, by several provisions of his will, a large and

valuable real estate to his children for life, with remainder to their children, confining his own children to the income only so long as they lived. Those in remainder had been vested with an interest that neither their parents nor the trustee could deprive them of, and in property of great value, and in disposing of the income from the sale of his medicines it is manifest that he intended it for the use of his children. They were then, however, quite young, and the testator knew that the income was at that time more than sufficient to supply their wants, and, therefore, he selected his trusted friend, Thomas L. Jefferson, as the one who should stand in loco parentis, and advance to them as their necessities demanded, with power to invest the remainder, if he saw proper. He was not only providing for the wants of his children during their minority, but he realized the fact that when of sufficient age and capacity to manage their own affairs they would require more of his estate, and he, therefore, vested his trustee with the power to pay out at his discretion all or any portion of the profits as they accumulate to his children in view of their necessities or capacity to use the same advantageously in business. "My executor may, in his discretion, pay out of said profits as they accumulate to any of my children the whole or a part of their portion of the same, as he shall deem proper in view of their necessities or capacity to use the same advantageously in business."

The executor is not confined to an advancement of such sums as would supply the children with the mere necessaries of life, but he is invested with plenary power to give to the children, as the parent could have done, any part, or all, of their portion of the income, in the event they manifest a capacity to take care of it, and of this the executor or trustee is made the sole judge. The only difference between the power conferred on the trustee and that belonging to the parent is that the parent could have made the children the objects of his bounty regardless of their necessities or conduct in life, while the trustee would be restrained from paying over to the children beyond what was necessary for their support and maintenance, if the child was so reckless in his habits and mode of living as to dispose of it in dissipation and extravagance as soon as it reached his hands. This provision was in fact intended more to restrain the child from engaging in the

vices and extravagances of life than to restrain the trustee from paying the money to him. There is nothing in the record showing that the sons or daughters, or their husbands, are recklessly wasting their estate, or without capacity to manage it, or that the trustee had acted in bad faith or has abused his trust.

The two sons had engaged in the manufacture of glass bottles, and were in a condition requiring the aid of the trustee from the means placed in his hands by the devisor for their benefit, and if the trustee had advanced the entire income of each it would have been in execution of the manifest purpose of the testator, or in the case of the purchase of a farm by one of the sons, and his inability to take up his notes or meet them at maturity, the trustee could have taken them up and charged the amount to the son, deducting it from the income to which he was entitled. The duty to do so, it is true, was not imperative, and the chancellor had no power to require the trustee to aid the son in this manner, but it would be a singular ruling to say that a trustee invested with such plenary power could not aid the beneficiary merely because he had been unsuccessful in business, and leave him to struggle against the misfortunes of life without assistance, in order that a collossal fortune might be created for the grandchildren, when it is manifest, in so far as the income of his estate is concerned, that his own children were the primary objects of his bounty. A failure in business and loss of means, by reason of reckless or dissipated habits or the want of mind to conduct the ordinary business affairs of life, would justify the trustee in withholding such assistance, and in fact to do so under such circumstances would be in violation of the trust, and would authorize the parties in remainder to invoke the aid of the chancellor. It is not necessary that the children of the testator should actually engage in business to justify the payment of this income by the trustee. It is their capacity to take care of and manage it, about which his discretion must be exercised.

The daughters may be able to manage their estate as well as the sons, and even with improvident husbands to take care of and secure what is given them by the trustee, and with husbands who are business men, the greater the reason for aiding them in all such matters, and when this money is paid over,

in the absence of bad faith on his part, those in remainder have no right to complain. When the child is not capable of managing the income the trustee may invest it in real estate or in the improvement of the real estate devised, or invest it in any other way, etc.; or even when the child is capable of managing his estate the trustee can not be compelled to pay the whole of the income over to him. It is still within his discretion. When invested it passes to the remainderman subject to the life estate of the parent, as expressly provided by the fifteenth clause.

The question of more doubt than any other, suggesting itself tc the mind of the court, arises as to the power of the trustee to withhold any part of the income, by investing it in real estate or any other property when the child is capable of managing it himself. There is an intention plainly expressed that the child should have the income, but when we consider the relation occupied by the trustee towards these children, and the broad and comprehensive power conferred, he stands in the place of the parent, with the power to say that a part of the income shall be invested in real estate or other property with the limitation placed upon it by the devisor in the tenth clause of the will. He may invest a part of the income of one of the children and pay over the entire income to the others, the investment of course being made so as to secure the child entitled to it to the income of the investment during life, remainder to his or her children.

The general doctrine is that "if trustees exercise these discretionary powers in good faith, and without fraud or collusion, the court can not restrain or control their discretion" (Perry on Trusts, section 911). There is less difficulty with counsel as to the law of this case than in its application in determining the extent of the power conferred. When the trustee is asked why he paid over to one of the children of the testator of the devisor the entire income from the patent medicines, his response is that the beneficiary, in his opinion, was capable of using it to his own advantage in his business affairs. And this is a complete response to those in remainder or to the chancellor, and nothing less than actual fraud or bad faith, which is equivalent to fraud, will authorize the chancellor to control the trustee in his action, or take charge of the trust

fund. His discretion, except for fraud, bad faith or an abuse of the trust, shall not be questioned or controlled. To give the clause in controversy the construction placed upon it by counsel for the appellants would make the children of the testator pensioners upon the bounty of the trustee for a mere subsistence, and create conflicting interests between them and their children never intended or contemplated by the devisor when disposing of this large estate; and the language of the fifteenth clause creating the discretionary power leaves the trustee uncontrolled in the exercise of a discretion that may prompt him to give to each of the children, when in his opinion they deserve it, the entire income arising from the manufacture and sale of the patent medicines. In determining the power of the trustee the right of the widow to her annuity must not be lost sight of, as the rights of the children are subordinate to her claim.

As to the remaining question made by counsel for the trustee, on the appeal of the latter, with reference to the character of the investments authorized to be made, the construction already given as to his powers over the income determined in effect the extent of his power to make investments. It is maitained by counsel for the appellants that the provision of the fifteenth clause of the will as to investments did not give to the trustee any greater power than he would have had in the absence of any discretion given him. In the present case there is a special direction as to investments in real estate, with an unlimited power to the trustee to make them in any other way that to him may seem best, and his discretion therein shall not be questioned or controlled, and the power to invest in personal securities, it seems to us, necessarily follows from the clause of the will in question. That provision contains something more than a general power to invest at the discretion of the trustee. He may invest in real estate; he may improve real estate and make any other investment he sees proper, and shall not be controlled in his action. In Brown v. French, 125 Mass., the trustees were directed "to use their own judgment as to investing the moneys arising from my estate, at the same time I would recommend to them the propriety of keeping at least one-half of the same invested in mortgage of unencumbered real estate, as I think well of that kind of

security." The trustees made investments in bonds of a foreign railroad company at less than par, and the court held that, having been made in good faith, the trustees were not liable. The English rule as to investments prevails in several of the States, and cases may be found somewhat analogous to this case sustaining the judgment below, but no case has been referred to in which the trustee has been made liable with such a broad and uncontrolled power given by the will. The testator confided the management of his entire estate to his executor, with a direction as to investments that indicates clearly an intention on the part of the testator that this executor and trustee should manage and control his estate as the testator could himself if he was living. We do not mean to adjudge that the trustee in selecting the subject for his investments must not exercise such care and prudence as to show that he was at least ordinarily diligent in making inquiry as to the solvency of the securities in which he invested, but, on the contrary, this is required of him, as the discretion conferred does not authorize investments in stocks, choses in action, or other securities that are insecure, and when by the exercise of ordinary diligence the trustee could have discovered that fact before the investment was made. He must look to the solvency of the securities in which he proposes to place the trust funds. If he does this in good faith, and the security is lost without neglect on his part, it is the loss of the estate and not that of the trustee.

The judgments on the appeals of Mary A. Bull v. Cromey, Trustee, and Ella B. Snively, Guardian v. Same, are each affirmed. The judgment on the appeal of Cromey, Trustee v. Edward Bull, &c., is reversed and cause remanded for proceedings consistent with this opinion.

Young & Trabue for John Snively.

Brown & Davie for E. and R. F. Bull.

John B. Baskin, guardian ad litem, for Mary C., Henrietta and John Bull.

E. W. C. Humphrey, guardian ad litem, for Ella Bull Snively.

James Harlan for Edward Bull.

John C. Russell and Geo. B. Eastin for Wm. Cromey, John Snively and Mary A. Bull.

# RIVES v. BROWN, &c.

(Filed March 18, 1884.)

**Note—Assignee—Due diligence—The assignee of a note, before he can recover of his assignor, must pursue with due diligence and exhaust all of his remedies, both legal and equitable, against the maker. Second, if he postpone bringing suit by request of assignor, such delay is not reckoned as want of diligence. But where the amount of the note was within the jurisdiction of the quarterly court, but to enforce the lien by which it was secured, only the circuit court had jurisdiction and suit in the circuit court was postponed at the instance of assignor, the assignee was still bound to secure personal judgment in the quarterly court, and a delay in doing so of two terms of court was not due diligence.**

Appeal from Butler Circuit Court.

Opinion of the court by Judge Hines.

The only question we need consider is whether appellant, to whom appellee assigned a note for $137, has pursued the maker thereof with sufficient diligence to authorize a recovery against the assignor. The amount of the note was within the jurisdiction of the quarterly court, but as the note was partially secured by lien on land to enforce which the quarterly court has no jurisdiction, a personal judgment and an enforcement of the lien at the same time could only be had in the circuit court. The note fell due in May, 1877, and suit was brought upon it in the Ohio Circuit Court, county in which the maker had resided, in March, 1878. It may be conceded that the failure to bring suit to the fall term of the circuit court was caused by the intervention of appellee, and that the maker of the note had left the county after the fall term and before the term at which the suit was brought. So far then as the institution of suit in the circuit court is concerned it may be admitted that there was legal diligence, but the question remains, was there want of diligence in failing to sue and get personal judgment in the quarterly court before appellee requested delay in bringing suit, or subsequent to the November circuit court? The quarterly courts began in that county on the third Monday in January, April, July and October. There was then one term of the quarterly court occurring almost two months after the maturity of the note and before any request on the part of appellee to delay suit, to which suit could have been brought and personal judgment obtained, and if the re-

quest to delay suit, which was only operative until the November term, 1877, of the circuit court, may be considered a waiver of the failure to sue to the July term of the quarterly court, there was the January term, 1878, of the quarterly court to which suit could and should have been brought. The assignee, to entitle himself to recover against the assignor on the contract of assignment, must exhaust his remedies, both legal and equitable, with due diligence, and must pursue his legal remedies with as much diligence as if he had no equitable remedy.

Section 376 of the Civil Code, which is the same as section 406 of the Code of 1854, authorizing the enforcement of the lien and personal judgment in the same action, does not lessen the responsibility of the assignee for failure to pursue and exhaust his legal remedies. Prior to these Code and the statute provisions two actions were necessary in order to get judgment that could be enforced by execution. Now it is permitted to unite the two actions in one when it does not interfere with the rights of an assignor under his implied contract of assignment. (Chambers v. Keane, 1 Met., 294.)

Judgment affirmed.

John L. Scott for appellant.

Thos. P. & Wm. Wand for appellees.

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## DOWELL v. MITCHELL.

(Filed March 18, 1884.)

**Deed—Certificate—Married woman—Although the certificate of acknowledgment of a married woman to a deed when taken by an officer of this State need not allege that she was privily examined apart from her husband, yet under General Statutes, chapter 81, section 17, she is not permitted to deny in an action against her grantee that such privy examination was in fact made unless she charges fraud against the grantee or mistake against the officer.**

Appeal from Green Circuit Court.

Opinion of the court by Judge Hines.

Appellee brought this action against appellant on a note secured by mortgage and signed by appellant and her deceased husband. The defense set up is: First, that she was compelled to sign the note and to execute the mortgage by the

duress of her deceased husband; second, that she did not acknowledge the mortgage separate and apart from her husband, and that neither the contents nor the effect of the mortgage was explained to her or understood by her. There is no charge of fraud on the part of appellee nor of mistake by the deputy clerk taking the acknowledgment, nor is there any pretense that appellee knew any of these things. Notwithstanding the failure to allege either of these things the court improperly admitted evidence tending to show some threats made by the husband prior to the acknowledgment of the mortgage; that he was present at the time of acknowledgment, and also tended to throw doubt upon the question as to whether the mortgage was explained to her, but there is no doubt, from the evidence, that she understood the contents of the mortgage. In the absence of any allegation as to fraud or mistake, as indicated, the evidence is immaterial since the mortgage was acknowledged subsequent to the adoption of the General Statutes. Section 17, chapter 81 of that revision reads:

"Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

Section 38 of chapter 24 provides that a memorandum of an acknowledgment endorsed upon an instrument by a deputy clerk may afterward be written out in full by the clerk, including in his certificate the memorandum by the deputy. That in this instance was done, and the following is the full certificate of the clerk:

"State of Kentucky, } sct.
"Green County. }

"I, J. S. Durham, clerk of the county court for the county and State aforesaid, certify that the foregoing mortgage from T. W. Dowell and his wife, Sarah Dowell, to James Mitchell was, on the 7th day of August, 1876, in Green county, before W. T. Smith, a deputy clerk of the Green county acknowledged in due form of law to be their act and deed, as ap-

pears from the endorsement thereon, as follows: 'Acknowledged in full by Sarah W. Dowell and her husband, Thos. W. Dowell, August 7, 1876, by W. T. Smith, D. C., for J. S. Durham, C. G. C. C.,' and the same, together with this certificate, is truly recorded in my office, this 20th day of January, 1877.

"J. S. DURHAM, Clerk.
"By H. DURHAM, D. C."

It will be observed that the certificate does not state that appellant was examined separate and apart from her husband, nor that the contents and effect of the mortgage were explained to her. It is apparently on account of the absence of these statements from the certificate that counsel for appellant insists that the evidence relied upon for appellee does not "call in question" the certificate of the clerk. A quotation of subsection 1 of section 2, chapter 24 of General Statutes, is a sufficient answer to this:

"Where the acknowledgment shall be taken by an officer of this State, shall simply certify that it was acknowledged before him, and when it was done, which shall be evidence that she had been examined separate and apart from her husband, and the contents explained to her, and that she had voluntarily acknowledged the instrument, and consented that it should be recorded."

The provisions of this section must be considered as a part of the certificate, and the certificate must be read and given the same effect as if these provisions were therein written out in full. That being done, it is clear that the admission of any evidence tending to show that the feme covert was not "examined separate and apart from her husband;" that "the contents" were not "explained to her; that she had" not "voluntarily acknowledged the instrument," or that she did not consent "that it should be recorded," would be calling "in question" the certificate of the officer.

It appears to be upon the same idea that counsel for appellant insists that Prible v. Hall, 13 Bush, 65, is not applicable to the case being considered. We think that case conclusive of this. Judgment affirmed.

A. Duvall for appellant.

E. W. Hines for appellee.

# LOUISVILLE & NASHVILLE & GREAT SOUTHERN R. R. CO. v. BROOKS' ADM'X.

(Filed January 26, 1884.)

**1. Negligence—Damages—In an action to recover for defendant's willful negligence it is proper to instruct the jury to find such punitive damages as they may think proper, not exceeding the amount claimed in petition, without specifying a smaller sum or intimating what should be the quantum of the verdict.**

**2. General Statutes, chapter 57, section 3, authorizes the recovery of both compensatory and punitive damages for willful neglect, and it is, therefore, prejudical to plaintiffs and not to defendants to instruct jury that if they believe defendants guilty of willful neglect to find punitive damages without saying anything of conpensatory damages.**

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hargis.

The appellant moved for a new trial on three grounds: First, that the court erred in giving the only instruction asked by the appellee; second, that the verdict was the result of passion and prejudice; third, that the verdict is not sustained by the evidence and is contrary to law. The motion was overruled and judgment of $10,000, the amount of the verdict, was rendered in favor of appellee, and the appellant has appealed, insisting on a reversal for the reasons stated above.

The instruction complained of is in this language:

"The court instructed the jury that if they believed from the evidence that the life of Chas. Brooks was lost or destroyed by the willful neglect of defendant's servants or agents engaged in running or managing the train, they should find for the plaintiff such punitive damages as they may think proper, not exceeding the amount claimed in the petition."

There are two objections urged by appellant to this instruction: One that the jury were to find such punitive damages as "they may think proper," not exceeding the amount claimed in the petition, which was $100,000; the other that the jury were not told to find any but punitive damages. Neither objection is well taken. If the court had stated to the jury a certain sum less than was claimed in the petition and such as it would not think excessive, then we would have been appealed to because the court had interfered with the province of the jury and clearly intimated what damages they should find.

The appellee had the right to have the jury pass upon her claim and declare whether any or all of it was just and lawful. The rule that authorizes the court to set aside excessive verdicts which are the product of passion or prejudice does not permit the court to anticipate that there will be an excessive verdict, and in advance confine the jury to certain bounds less than the plaintiff's claim. If allowed it would be attended with two serious difficulties: First, the court could easily suggest the quantum of the verdict; second, it might in almost every case practically fix it. The peculiar province of the jury over the right to assess damages in such cases within lawful bounds would thus be open to an invasion by the court which would sooner or later subject the whole of the rightful domain of the jury.

By section 8 of chapter 57, General Statutes, for willful neglect in causing the death of her intestate, the appellee, as administratrix, had the right to sue and recover punitive damages.

The cases of Chiles v. Drake, 2 Met., 147, and L., C. & L. Railroad Co. v. Mahoney's Adm'x, 7 Bush, 238, expressly decide that the statute, upon proof of willful neglect, authorizes the recovery of compensatory and punitive damages. As both classes of damages may be considered by the jury in making up their verdict, certainly the appellant was not prejudiced by the action of the court in not so instructing them. For if the jury had been fully and correctly instructed on this point, which could only have been done by informing them that it was their duty to give compensatory damages, though confined to the intestate's ability to make money, the death being instantaneous, and also punitive damages for the destruction of his life, the grounds for increasing their verdict would have widened rather than contracted. This statute is different from the common law rule, which left punitive damages discretionary with the jury, in this, that it expressly authorizes the recovery of punitive and also embraces, as this court has held, compensatory damages in cases of death resulting from willful neglect, and the trial court has no legal right to instruct them otherwise. According to our view the instruction was improperly limited to punitive damages, and in that respect militated against the rights of appellee, rather than those of appellant.

Whether the damages are excessive depends alone upon the fact whether the evidence of willful neglect is sufficient to sustain the verdict. It is the province of the jury to determine this fact under proper instructions, and unless their verdict is palpably against the weight of the evidence it should not be disturbed. The evidence is conflicting. It tends to prove that on the night of Brooks' death he was rear brakeman on a freight train, which came into Lebanon depot almost one hour behind time. The night was dark and rainy. The engineer was out of humor, and he and others were cursing and using loud words to such an extent as to attract the attention of persons located near the depot.

There was much apparent confusion. The train was cut in two parts, one portion being left standing while the engineer was switching, for the purpose of changing some of the cars. After the switching was done except to connect the portions of the train as made up with laden part, which had been left standing on the track, the engineer undertook to do that, and in running back to it went against it with such speed as to knock the cars, which were heavily laden with freight, several car lengths up an upgrade. In that collision the deceased evidently lost his life. His station on the train, according to the evidence, made it his duty, unless directed otherwise, to make the coupling at that place. No one, except the deceased, could have done the coupling unless the conductor set the pin so as to give it automatic power, and thus avoided the necessity of the deceased doing his duty with respect to that coupling. The train, at any rate, was coupled and moved off, leaving Brooks dead, and none of the employes knew of the catastrophe nor did they discover it except through a dispatch received several hours after the train had left the depot.

Brooks' hat was lying close to the point where he ought to have made the coupling, showing that the sudden clash of the cars, driven by unnecessary and reckless force, knocked his hat off. His lantern was found further away and on the line his body had been dragged. This was natural, for in the first convulsions of death he would cling to his lamp long enough to carry it some distance from the point at which he was struck. Then his body was found still a greater distance from the place

of coupling than the lantern. There was evidence somewhat unreasonable in itself adduced for the purpose of showing that Brooks was not in his right place in coupling the cars, and that the engineer was not aware of his presence at that point. This testimony, however, was contradicted by its intrinsic improbability, the proven admission of the conductor that he ordered him to make the coupling, and his manifest duty to make it unless otherwise ordered or informed of facts which showed it unnecessary for him to do so. Besides, the preservation of the lives of brakemen and those required to make couplings demand that switching and running the parts of trains together for that purpose should be done with less speed and more care than was exhibited on the night Brooks lost his life.

Great care should be used by all concerned in making couplings, otherwise subordinates will have but little chance for their lives and bodies, but unnecessary or unreasonable precaution is not required by the law in this or any other branch of railroad service. Whether the facts proven in this case establish willful neglect was a question peculiarly within the province of the jury, who saw and heard the witnesses and had the right to consider their credibility and the reasonableness of their statements, there being contradictions of the conductor proven without objection, and inherent improbability in the theory of the defense in the light of the circumstances and general recklessness and bad temper displayed in switching that night.

There is evidence in the record when the whole is considered that forbids the declaration that the verdict, finding willful neglect, is flagrantly against the weight of the evidence. In fact a close and philosophical analysis of the evidence shows that it sustains the verdict.

The definition of willful neglect was favorably given at the instance of appellant in its behalf, and as that fact, essential to a recovery in actions of this class, has been found under instructions to which no legal objection has been shown by appellant, we are constrained to conclude that $10,000, according to the case of L. & N. R. R. v. Fox, 11 Bush, 504, and the authorities therein cited, is not excessive damages for the destruction of

the life of a human being by reason of the willful neglect of the appellant's agents.

Wherefore, the judgment must be affirmed.

Rountree & Lisle and Wm. Lindsay for appellant.

Simrall & Bodley for appellee.

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## PEYNADO'S DEVISEES v. PEYNADO'S EX'OR.

(Filed March 8, 1884.)

**1. Will—Construction—Where the intention of the testator is plain from the will taken as a whole the court will endeavor to carry out that intention, and in doing so will, if necessary, disregard particular expressions, supply defective descriptions of property and broaden restrictive provisions.**

**2. Charitable uses—Trustee—Construction—Testator gave his estate to his wife for life, and then provided that one year after her death his estate should be divided into two parts, one-half to be used in building an orphan asylum in the city of M., in Spain, the other half to be used for its support; the asylum to be under the control of the city authorities of M. Held—First, the widow having renounced the will and claimed her dower, the executors might proceed to execute the charity with the residuum at once without waiting for the death of the widow; second, a municipal corporation may be trustee of a charitable use; third, a charity being authorized by the law of this State is not invalid because created for the benefit of foreign orphans and to be administered under foreign laws; fourth, the will construed to contain a request that the Spanish minister will appoint an honest person to execute the trust, the appointment of such person is, therefore, not a condition precedent; and a direction given executor to require security of the minister construed to apply only if he claims custody of the trust fund.**

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

By his will, after making various bequests, Edward Peynado devised the residuary of his estate to his wife, Ida B. Peynado, during her life, and then made the following provisions:

"15th. One year after her death the whole of my residuary estate shall be converted into cash, and together with all accrued interest, shall be invested as follows:

"16th. Half of the money left by me after my wife's death to be used in erecting a building in the suburbs of the city of Malaga (Spain), to be under the patronage and care of the city authorities and under the superintendence of one or more Sisters of Charity, to be used as an Orphan Asylum and school

for as many little poor orphan children (males) from respectable families as can possibly be taken. The Sisters in charge of said establishment should be well educated and well versed in geography, mathematics, grammar, history and penmanship, so as to be able to teach the children to become learned and industrious. I have no doubt the institution will be assisted and encouraged by the good and wealthy citizens of Malaga and will some day become a great institution. The other half of my capital or residue to be placed out on good security so as to yield a semi-annual income, and shall be applied in paying the expenses incurred in keeping up said boarding establishment. I also leave our pictures, two oil paintings of my wife and myself, to the said institution.

"17th. A true copy of this will will be sent to the then acting Spanish minister of Spain at Washington, D. C., by my executors, with the request that he should see that an honest man be appointed to superintend and fulfill my wish, a man who, without any reward for his services and only for the sake of doing good to my native city, will take willingly the responsibility and trouble necessary for such a task. The person so appointed will have to give security and also hand a semi-annual statement of the condition of the institution to the then acting civil authorities of Malaga. As the children of the institution become of age, I mean able enough to make a living for themselves, the friends of the institution will be kind enough to procure for them situations in commercial houses, stores and factories, where they can earn an honest livelihood. This institution shall not at any time incur or owe a debt exceeding $5,000.

"18th. My executors will demand security from the Spanish minister or his representatives that my will shall be carried out according to my wish, and they shall keep in trust, if they think proper, the whole of my residuary estate for three years after my death, or until they are convinced of the fulfillment of my wish by the Spanish minister and authorities of Malaga.

"19th. If within three years after my death this bequest fail of execution from any cause, then the same shall lapse and be void and the whole of my residuary estate, together with all accrued interest, shall be divided amongst the children of

Francisco de P. Parra, sr., Juan Jose Parra, Augustin Parra, Joaquin Parra, and Diego Parra, of New Orleans, La., and children of Jose Ma Parra and Jose Ma Vega, of Malaga, Spain."

The will was probated and the widow renounced its provisions in her behalf. This action was brought to obtain a judicial construction of the above clauses of the will, the ultimate residuary devisees named in the nineteenth clause, the city of Malaga and the acting Spanish minister being made defendants. The city of Malaga and the Spanish minister, by their attorney in fact, answered separately, claiming that the will created a trust with sufficient certainty for the purpose of erecting an orphan asylum in the city of Malaga; that the city was designated as the trustee and is capable, being an incorporated municipality, of accepting the trust, and the widow having renounced the provisions of the will, entitled to the residuum and ready to proceed at once to the performance of the duties prescribed by the will and according to its terms.

The ultimate residuary devisees asserted claim to the residuum of the estate on the grounds:

1st. That the trust is too vague to be upheld, and there is no discretion vested in anyone to cure the uncertainty.

2d. That the will requires the Spanish minister to give security as a condition precedent to the existence or execution of the trust.

3d. And if no security was required by the will the court ought to exact it for their protection, and to retain effective control of the property represented by the surety, in the event of nonexecution of the trust within three years after the testator's death.

Each of these propositions was rejected by the learned chancellor in his construction of the trust clauses of the will and a judgment rendered by him in contraposition to all of them, and the proper interlocutory orders entered to carry out the charitable intention of the testator. To test the legal virtue of that judgment this appeal was taken by the ultimate residuary devisees.

Their position has for its basis two propositions: First, that there is no room for equity to interfere where there is no ambiguity in the testator's declaration; second, that there is no

ambiguity in this will, but simply a nonuse of such terms as are essential to the creation of a trust.

It is not necessary to the results of this opinion that the first proposition, were it law in an unlimited extent and suitable to all states of fact, which we are inclined to doubt, should be combatted, it is only indispensable that the assumptions of the second should be overthrown.

There is no ambiguity of intention in this will. More appropriate language might have been used in the creation of such an important and worthy trust, but where the language, whatever may be its purity or defects, expresses the intention of the testator in making a lawful disposition of his property. That intention will be the pole star to guide the court in interpreting the meaning of his words and construing the composition of his testament.

Where there is no ambiguity of intention ascertained by all of the language of the will, there can be no legal ambiguity attached to the will from particular expressions, defective description of property, and constrained mandatory provisions, for they may be controlled, supplied or broadened by the context and general purpose of the will. Applying these simple cardinal rules to this will, it becomes clear that there is no uncertainty as to the trust, and no need of discretion upon the part of anyone to render it effectual. The testator did not intend that his estate should be converted into cash for investment, as directed in the sixteenth clause, until one year after his wife's death. His purpose was based upon her anticipated acceptance of the provisions of the will, the object being to allow her the uninterrupted use during life of the property which he dedicated to the erection and support of the charitable institution plainly described and specifically located by the sixteenth and seventeenth clauses. The reason for postponing the conversion of the residuary of his estate having ceased by the renunciation of the widow, that limitation ceased with it, and according to Wood v. Wood, 1 Met., 512, and Curling v. Curling, 8 Dana, 38, her act precipitated the conversion of the residuary after deducting her dowable and distributable portion, hence there is no obstruction to the immediate performance of the trust duties prescribed by the testator. He

says substantially, in the sixteenth clause, that half of the residuary of his estate shall be used to erect a building in the suburbs of the city of Malaga, Spain, to be used as an orphan asylum and school for male orphan children, and the remaining half of the residuary shall be loaned on good security with interest payable semi-annually, to be applied to the current expenses of the institution, which he denominates "a boarding establishment." Language could hardly make the object of the trust more definite.

The institution, he directs, shall be under "the patronage and care of the city authorities" of Malaga; that a male superintendent of the institution be appointed by the city authorities, to whom he is required to give security for his conduct under his appointment, and also make a semi-annual statement of the condition of the institution. Thus we see that the city of Malaga, in its official capacity, is the trustee of the charity. It is its duty to look to it that the institution shall be conducted under the superintendence of sisters of charity as teachers of the children. There is no want of a trustee to execute this charity, the city is the trustee and it is capable of performing the duties of that station. A municipal corporation may hold property in trust for charitable uses and be compelled to execute such trust (29 Mo., 592; Story's Eq., section 1191; Perry on Trusts, section 43, and authorities there cited), and we are not aware of any law, where a charity is definite, its objects specific, its creation legal, and the trustee capable, that renders such a trust void for uncertainty. The doctrine of cypres construction is wholly unnecessary to the determination of this case for the reason that the object of the trust is not forbidden by any laws, and the intention of the testator is plain from his own words. The authorities in and out of this State clearly sustain the conclusions indicated. In the case of Moore's Heirs v. Moore's Devisees, 4 Dana, 354, a devise for the education of poor orphans, to be selected by the county court, was upheld. In Curling's Adm'r v. Curling's Heirs, 8 Dana, 38, the court sustained a devise for a public seminary and appropriated the fund to a seminary then existing in the county.

These cases are founded upon devises not so clearly expressed as the one before us, and they are in accord with the doctrines of Story and the succeeding cases of Chambers v. Baptist Ed-

ucation Society, 1 B. M., 215; Attorney General v. Wallace's Devisees, 7 B. M., 611. The charity intended by the testator is sufficiently provided for in his will and authorized by the law and public policy of this State, and according to the rules of comity it can not be defeated, because it is for the benefit of foreign orphans and to be administered according to Spanish jurisprudence, which we will presume, in the absence of anything to the contrary, is consistent with the dictates of humanity and the fundamental laws of an enlightened civilization.

Perry on Trusts says, in section 741: "Bequests to be paid over to trustees in a foreign country for the establishment in such country of a charitable institution will be paid over to such trustees, by order of court, to be administered by them under the jurisdiction of the courts of their own country."

This text is supported by numerous authorities and substantially stated by Story in section 1186 of his Equity Jurisprudence, and until the principle it contains is restricted by inimical legislation we feel bound to maintain it.

It is true the testator, in the seventeenth clause, requests the Spanish Minister to see that an honest man be appointed to superintend and fulfill his wish, but he is not empowered with authority to make the appointment. This request does not confer any power upon the minister, nor is it an enforcible exaction of duty from him. He may or may not busy himself with the authorities of the city of Malaga in seeing that an honest man is appointed, but this will not render the charity void or necessarily prevent or endanger the fulfillment of the testator's wish. It is a request he had the privilege of making, and the Spanish Minister has the lawful right to respect or decline as he may choose. The eighteenth clause, by which the executors are required to demand security of the Spanish minister, contemplated that the funds might be paid to him for transmission to Malaga, and if his executors saw proper to entrust him with them they were required to exact of him security, and if the executors did not wish to do that, they were authorized to keep the funds in trust for three years after the testator's death, or until they were convinced of the fulfillment of his wish by the Spanish minister and the authorities of Malaga. The Spanish minister is not asking to handle the funds. He

yields that to the city of Malaga, and it has appointed its attorney in fact to receive and carry the funds to it. The authorities of Malaga have shown that they are willing to undertake the trust in good faith for the purpose of fulfilling the testator's wishes, hence there is no necessity for the executors keeping the funds in trust for three years. The only security required in the will is of the Spanish minister in the event suggested, and as he is not to use or handle the funds, and the city comes in fact and asks the control of them by its own agents, we can see no reason for demanding surety of the city or Spanish minister. The testator did not intend to interpose obstacles to the execution of his bequest, so that three years might expire in a vain effort to recover them and the bequest lapse in the meantime. Such would be the result if surety were required of the Spanish minister and he should refuse to give it. The result would be the same if the court were to require security for the preservation of the property to the use of the appellants and the authorities of the city of Malaga should decline to comply with the requisition. It is for the courts of Spain to see that the trust fund is preserved and the trust property administered, when lawfully applied to for such purposes.

Wherefore, the judgment is affirmed.

Barrett & Brown for appellants.

Rozel Weissinger for appellees.

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## RECENT LEGAL LITERATURE.

Law of Marriage and Divorce. By David Stewart. Sumner, Whitney & Co., San Francisco, pages 546, 1884.

Law of Real Property. By Chas. T. Boone, LL. B. Sumner, Whitney & Co., San Francisco, pages 536, 1884.

Since the days when the learned and elegant treatises of Kent, Story and Greenleaf were first given to the profession, a new school of law writers has sprung up, who handle their subjects in a very different style. They do not write treatises; they make digests. To this school belong Sir James Stephens and Desty. The mode of treatment of these writers is to state

the principles decided by the cases in the concisest terms consistent with perfect clearness, rejecting all commentary and making each sentence the representative of a case. This is nothing but a digest, but it is very useful for convenient reference. It does not show what the law was or ought to be or peculiar theories of the author, but only what it is and in what report it may be found. This is of course what the practitioner wants. Mr. Stewart's work on Marriage and Divorce and Mr. Boone's on Real Property are both done up in this manner, and are sure to prove of great value to the profession. The publisher has done his part well. The volumes are uniform in size with Desty's Federal Procedure—pocket volumes—and are a great improvement on the ponderous octavos we have so long been accustomed to handle.

Commentaries on American Law. By Francis Wharton, LL. D. Kay & Bro., Phila., pages 856, 1884.

This is the work of a well-known and very prolific writer. His published works already number 17 volumes on various subjects—some as technical as "Precedents of Indictments"—others as general as "Conflict of Laws." Having such an extended acquaintance with different branches of the law as this implies, he is entitled to a very attentive audience even when he ventures on such a well-worked field as "Commentaries on Law."

The volume before us considers severally International, Statutory and Constitutional Law. The part relating to the latter subject is particularly valuable because it brings the discussion on that subject down to the present day, embracing cases decided by the U. S. Sup. Ct. as recently as Antoni v. Greenhow, the Va. Repudiation case; U. S. v. Stanley, the Civil Rights case, and the East River Bridge case. These are all placed beside and compared with the old cases, and the growth and development of particular theories marked. In discussing these questions the author seems to put aside entirely all political bias, and it is difficult to tell whether he is Republican or Democrat. He handles even the secession and war questions so as to leave you in doubt whether he was a Unionist, Southern sympathizer or War Democrat.

## NOTES.

The well-known case of Elwes v. Mawe, which Mr. Smith thought worthy of a place in his Leading Cases, and which has so long been followed as a guiding light on the subject of fixtures is violently attacked in a recent edition of Amos & Ferrard on Fixtures as opposed to all the precedents which Lord Ellenboro cites in it and to the year books which he mistranslates. Prior to it the rule was that fixtures were the tenant's, subject to an occasional exception in favor of the landlord. That rule he reversed.

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We take the following rather melancholy review of the condition of the Scottish bar from the Edinburgh Law Magazine:

The consequence of this concentration of business is that the men into whose hands it falls have time for nothing else. They live a hard and toilsome life, full of honest labor, but ultimately productive of the worst results both to themselves and to the bar of Scotland. The daily round of one of these legal slaves is from year's end to year's end the same; from ten in the morning till half-past three in the afternoon speaking and hurried reading, an afternoon of consultations or study, a couple of hours for dining and relaxation, the study at eight, and the evening's work. This goes on for fifteen or twenty years, and then the result is seen—a man of great acquirements in the law, a nimble mind, a marvelous memory, great power of application, the most perfect self-denial, the most praiseworthy industry, the possessor of excellent claret, a model of respectability, a pattern of domestic virtue. But that is all; for his whole powers are concentrated in one narrow groove.

This would be of little or no consequence if the Scotch bar was merely a profession by which a livelihood was to be made; but in the history of Scotland it once was something more. It was a noble calling, followed by men who led their countrymen in literature and in public life, who were ready to sacrifice much for the opportunity of being the representatives of the thought and culture of their day, and who, therefore, gave to the bar of Scotland that position of influence and power which we fear it is destined soon to lose.

The following scene occurred in the New York Supreme Court the other day:

The Chief Justice—"Mr. Williams, we think you ought to accredit this court with some knowledge of the law, and not occupy so much time in discussing elementary propositions."

Mr. Williams—"May it please your Honors, I did so accredit the court below, and did avoid, therefore, the discussion of elementary principles, and for that reason I have been obliged to take this appeal."

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The attention of the bar of the State is called to the following rule adopted by the Court of Appeals on 15th March, 1884:

## RULE XIX.

Petition for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the court, or that the decision is in conflict with a statute, or with a controlling decision to which the attention of the court was not drawn, through neglect or inadvertance of counsel.

Any petition violative of this rule will not be filed, and if filed will be stricken from the record.

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

## Not to be reported in full—Alphabetically arranged according to their subject-matters.

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Advancements—

A father executed several writings, promising to pay to the child named in each a certain sum by way of advancement, not to be payable until after his death, except at his option, and at the same time made his will, reciting that he had executed the writings described with a view of equalizing his children, and directing that the unpaid remainder due upon these writings, or "notes," at his death be paid out of the proceeds of his estate "before there is any further distribution."

Held—That the writings executed by the testator to his children must be construed in connection with his will, which shows that they were simply written memorials of the amounts necessary to equalize the holders with others who had received advancements, and not enforcible obligations for the payment in præsenti of money. Therefore, the husband of the holder of one of these notes, who died without issue during her father's lifetime, can not maintain an action thereon, the testator having provided that the portion of any child dying in his lifetime without issue should go to the remaining brothers and sisters. Hackley's Adm'r v. Kelly,'s Adm'r. March 11, 1884. Garrard Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. Burdett & Walton for appellant; W. O. Bradley and Anderson & Herndon for appellee.

Appeals—

1. Appeal from Superior Court is tried on identical record used in that court. Emerson, &c. v. Dye, &c., ante, 734.
2. Clerk is liable if he fails to collect tax on such appeal; but failure to pay tax no ground for dismissal. Ib.
3. Reviewable error—The action of the court in overruling exceptions to depositions in an ordinary action can not be reviewed where there was no motion for a new trial. Booth v. Wood. Opin. by Richards, J., Sup. Ct., aff. G. W. Ray for appellant; Weir, Weir & Walker for appellee.
4. Power of appellate court over its judgments—An appellate court can not entertain bills of review of its own decisions; when it has passed upon a petition for a rehearing, if presented, and has adjourned for the term the cause is beyond its reach. The court can not set aside an order overruling a petition for rehearing made at a previous term.

5. Appeal from Superior Court—The fact that a decision of the Superior Court is erroneous is no ground for granting an appeal to the Court of Appeals. Prather v. Phelps, &c. March 19, 1884. Washington Cir. Ct. Opin. by Reid, P. J., Sup. Ct., overruling motions. L. R. Thurman and J. W. Lewis for motions; W. H. McCord, contra.
6. Making instructions part of record—An order of court may make instructions part of the record by entering them on the order book or directing them to be filed of record, but an order reciting merely that the court gave an instruction marked "A" and refused one marked "B" does not purport to make them a part of the record and does not have that effect. Chicago, St. L. & N. O. R. R. Co. v. Lamkin. March 19, 1884. Hickman Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. N. P. Moss for appellant.
7. Reversal in part—When the petition sets out several causes of action founded upon unconnected and separate contracts, and the plaintiff's claim under each contract is determined by the judgment, in which there is an error, the judgment should be reversed only as to the cause of action where the error was committed, and affirmed as to the causes of action as to which it is correct. Newman v. Bradford. March 12, 1884. Pendleton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Simon & Bonar for appellant; Clarke & Applegate for appellee.
8. Jurisdiction—In an action of trespass for breaking and entering the close where the title is brought in issue the judgment as between the parties determines the title in the same manner that a recovery in ejectment would, and although the recovery is only for one cent in damages the Court of Appeals has jurisdiction. Thacker v. Crawford, &c. March 4, 1884. Lee Cir. Ct. Opin. by Pryor, J., Ct. Ap., reh'g granted and reversed. H. C. Lilly & Son for appellant; John L. Scott for appellees.
9. Partial transcript—This being an appeal from a judgment in an action to settle a decedent's estate, and the transcript failing to show that it contains what was ordered to be copied by the judge, the court presumes that the judgment of the lower court is right and affirms it. Lilly & Smith, &c. v. Gardner's Adm'r. March 26, 1884. Estill Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. H. C. Lilly for appellant.

Appeal Bond—

In an action upon an appeal bond executed upon appeal to the circuit court the correctness of the judgment of the circuit court on the appeal can not be reviewed. Thixton v. Goff. March 5, 1884. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Weir, Weir & Walker for appellant; W. N. Sweeney & Sons for appellee.

Arbitration and Awards—

Errors—New evidence—Errors committed by arbitrators in the exercise of their judgments on the questions made before them afford no ground for relief against the award, nor does the discovery after the award of testimony which, by proper diligence, might have been discovered and presented to the arbitrators afford any ground for relief. Cook's Ex'or v. McRoberts' Adm'r. March 1, 1884. Lincoln Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Welch & Saufley for appellant; Hill & Alcorn for appellee.

Assignment for Benefit of Creditors—See Fraudulent Conveyances.

Assignments of Error—

That appellant was not allowed to prove certain facts insufficient unless it is also alleged a witness would have stated them. Louisville, &c., R. R. Co. v. Sullivan, ante, 722.

Assignor and Assignee—

1. When one has assigned a note in payment for a thing purchased, and especially when he concurs in the subsequent assignment of that note by his assignee in payment of a debt he owes, whereby it finally comes to the holder, ignorant of all these things and taking it merely as security for an existing liability, he can not be deprived of the security and the legal title by the original assignor merely because the latter has, since his assignment, a cause of complaint against his assignee growing out of the subject-matter forming the consideration for the assignment. Buckler v. Henson, &c. March 5, 1884. Robertson Cir. Ct. Resp. by Bowden, J., Sup. Ct., to pet. for rehearing. Winfield Buckler for appellant; Thomas Owens for appellees.
2. Assignee must pursue maker of note with due diligence, but delay at request of assignor is no want of diligence. Rives v. Brown, &c., ante., 745.

Attachments—

1. Equity—Jurisdiction—Courts of equity have concurrent jurisdiction with courts of law in all actions commenced by issuing and levying attachments, and when the property attached is brought into court any third party claiming to be the owner may file his petition in the same action asserting his interest. Lee, &c. v. Wilson, &c. March 19, 1884. Marion Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Russell & Avritt for appellants; W. B. Harrison and John McCord for appellees.
2. Garnishee—Notice—Where a debt due the defendant is sought to be attached a copy of the order of attachment, with a notice specifying the debt attached, must be delivered to the person owing it. Robinson & Co. v. Basham & Cox's Ass'ee. March 19, 1884. Lou. Chy. Ct. Opin. by Reid, P. J., Sup. Ct., aff. J. S. Kline for appellants; A. C. Rucker for appellee.
3. Levy—Description of land—Before there can be a decree for the sale of real estate under an attachment the officer's return upon the attachment must identify the property with such accuracy as to leave no doubt as to the property embraced. The following return is held to be too indefinite "Levied this attachment October 12, 1880, on a tract of — acres of land as the property of James H. Pumphrey, by posting a true copy of the within on said land, lying in Nicholas county, on the waters of Stony, and adjoining the lands of M. Rafferty and others." Pumphrey v. Rafferty. March 5, 1884. Nicholas Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. W. P. Ross for appellant; Holladay for appellee.
4. Custody of attached property—Attached property is in the custody of the officer, and third parties, claiming such property, having been enjoined from taking it, the officer had no right to take from them a bond

stipulating for a performance of the judgment in that case by paying the plaintiff such sums of money as might be adjudged him in that action if it should be adjudged that the injunction was properly granted, and he had no right to surrender the property to the claimants upon the execution of the bond; but even if the bond were valid no recovery could be had, as it does not appear that anything was adjudged in that case except that the injunction be perpetuated.

5. The liability of the surety in the bond can not be extended by reason of a subsequent order consolidating the attachment and injunction cases.
6. Appeals to Circuit Court—Appeals to the Circuit Court are to be tried as if no judgment had been rendered, and an appeal can not be taken from part of a judgment, as such a practice might result in conflicting judgments.
7. Order to surrender attached property—An order in the judgment to one of the defendants to surrender the attached property to the officer ordered to make the sale, and in default thereof to appear at the next term and show cause why he did not do so, can not be regarded as a peremptory and final order to produce the property, and the surety in the appeal bond is not liable for the defendant's failure to comply with that order. Thixton v. Goff. March 5, 1884. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Weir, Weir & Walker for appellant; W. N. Sweeney & Sons for appellee.

Appeals to Circuit Courts—See Attachments, 4.

Bankruptcy—See Pleading, 1—

1. Pleading discharge—When a party relies upon his discharge in bankruptcy he should allege "facts supporting the allegation of a discharge." It is not sufficient to allege merely that he has been discharged.
2. The plaintiff having in his amended petition abandoned the cause of action set up in his original petition, the admission in the original petition that the defendant had been discharged in bankruptcy from the demands there sued on does not affect the new demand set up in the amended petition. Greene v. Magowan. March 19, 1884. Montgomery Cir. Ct. Affirmed by divided court, Reid, P. J., not sitting. Opin. by Richards, J., Sup. Ct. E. W. Hawkins and A. Duvall for appellant; O'Hara & Bryan for appellee.

Bills of Exceptions—

Order filing—An order reciting that a bill of exceptions was "signed, sealed and delivered as the manner is" did not file the bill or direct it to be filed, and, therefore, it is not a part of the record. Kentucky Lodge, No. 39, &c. v. White. March 19, 1884. Gallatin Cir. Ct. Resp. by Richards, J., Sup. Ct., to pet. by appellant for reh'g. J. J. Landram for appellant; Geo. C. Drane for appellee.

Bonds—

1. Action on official bond—Bonds given to the Commonwealth for the performance of official duties, by the breach of which individuals may be damaged, are contracts made with the Commonwealth for the benefit of the person injured, and, therefore, the action may be in the name of the Commonwealth for the use of such person.
2. Action for benefit of infant—Where the person injured is an infant it is proper to bring the action in the name of the Commonwealth for his benefit, and not for the benefit of his guardian.

3. Section 21 of the Code is permissive merely, and does not prohibit the person injured from suing in his own name under the general rule declared in section 18. Commonwealth, For Use, &c. v. Shepperd. March 26, 1884. Pulaski Cir. Ct. Resp. by Bowden, J., Sup. Ct., to pet. for reh'g. Curd & Waddle for appellant; Morrow & Newell for appellees.

**Charitable Use**—See Peynado's Dev. v. Peynado's Ex'or, ante, 753.

**Common Schools**—

1. Action by trustees—The trustees of a school district may maintain an action for the recovery of school property, and while they may sue as trustees only, it is proper to give their names, that the party sued may know who are claiming to be the trustees and entitled to the possession, and he should be allowed to controvert the fact that they are the trustees, and to deny their right to recover.

   The plaintiffs having sued in this case as "The Trustees of School District No. 19," without giving their names, a plea denying the existence of any trustees is good as a plea in abatement at common law or under the Code.

2. School property—The trustees of a school district can not maintain an action to recover a piece of ground given to build a school house upon for the benefit of the neighborhood, a building having been erected by the neighbors and used as a school house. The patrons of the school, or one, for all, must sue. Lewis v. Trustees School Dist. No. 19. March 25, 1884. Louisville Chancery Court. Opin. by Pryor, J., Ct. Ap., rev. S. O. Graves and Thos. B. Fairleigh for appellant; C. B. Seymour for appellees.

**Consideration**—See Contracts, 1, 2.

**Contracts**—

1. Consideration—The recognition by appellee that he had gotten land of appellant at judicial sale for less than its worth, and his promise to the administrator of appellant's father, appellant being then an infant, that he would remunerate her when he could do so safely, does not amount to a contract upon which an action could be maintained, even if not within the statute of frauds; nor does the allegation that appellant has relied on the promise of appellee to remunerate her for said land until it is too late for her to re-open the proceedings of the action in which the land was sold, more than a year having elapsed since she became of age, state a sufficient consideration for the contract. Emmerson v. Zimmerman. March 8, 1884. Hickman Court of Common Pleas. Opin. by Lewis, J., Ct. Ap., aff. Geo. L. Husbands for appellant; N. P. Moss for appellee.

2. Illegal consideration—No court, whether of equity or law, will permit one to enforce a claim founded upon an illegal consideration, and thereby become the beneficiary of his own wrong.

   The court refuses to aid appellant in enforcing a contract made with appellee to despoil a third party and give to appellant the larger part of the spoils. Jones v. Redman. March 15, 1884. Clay Cir. Ct. Opin. by Hines, J., Ct. Ap., aff. J. & J. W. Rodman for appellant; W. H. Randall for appellee.

Contribution—

Joint obligors—Where one of several joint obligors has paid the entire debt he is entitled to contribution from each of the others who were equally liable. Greene v. Magowan. March 19, 1884. Montgomery Cir. Ct. Affirmed by divided court. Reid, P. J., not sitting. Opin. by Richards, J., Sup. Ct. A. T. Wood and Apperson & Woodford for appellant; H. L. Stone for appellee.

Criminal Law—

Instruction as to manslaughter—The conviction of appellant of the crime of murder was upon the idea that he was maliciously aiding and abetting those who actually did the killing, and as the jury might have concluded from the evidence that the part he took in the affray was caused by sudden heat and passion, it was error not to instruct the jury as to manslaughter, especially in view of the fact that the jury, after hearing all the testimony in the case, returned into court with the inquiry as to their right to find the accused guilty of a less offense than murder. Smith v. Commonwealth. March 27, 1884. Bracken Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. R. H. Smith for appellant; P. W. Hardin for appellee.

Damages—See Negligence, 1, 2—

Breach of contract to build house—For the failure of a party to comply with his contract to build a house for another by a certain time the latter can not recover damages for the possible time he will be compelled to pay rent before he can have his house finished for occupancy, nor for the apprehension that he may be compelled to make another contract less advantageous for the erection of his building, such damages being too remote. Jaudes, &c. v. Fisher, &c. March 5, 1884. Boyd Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. R. C. Burns for appellants; John W. Hampton for appellees.

Deeds—

1. Value of unrecorded deed—An unrecorded deed is good against a subsequent creditor having actual notice of its execution.
2. Consideration—The grantee in a deed which recites a consideration of love and affection only may show a valuable consideration. Thomas v. Smith, &c. March 27, 1884. Ballard Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. C. S. Marshall for appellant; John Rodman and S. W. Nichols for appellees.
3. Married woman can not attack certificate of her acknowledgment to deed. Dowell v. Mitchell, ante, 746.

Dower—

1. Proof of marriage—In an action for dower proof that the plaintiff and the decedent lived together as husband and wife for eighteen years in one community, and that the marriage relation was recognized by them and by all with whom they had any intercourse during the entire period, made out a prima facie case of marriage, and the law under such circumstances will presume the marriage to have been regular until the contrary is shown. Besides, in this case there was read as evidence the marriage license, with the certificate of the minister annexed that he performed the ceremony, certified by the clerk under seal as a true copy, and as there was no objection taken to the record as evidence it is too late to raise the question in this court for the first time.

2. The widow was a competent witness to prove the marriage.
3. Homestead—Although where the husband dies the owner of the homestead and it passes to his widow, she can not claim both homestead and dower; the fact that the husband was allowed the value of the homestead during his life can not affect the right of the widow to dower. Powell v. Calvert. Foerg v. Same. March 27, 1884. Caldwell Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. F. W. Darby and W. P. D. Bush for appellants; Geo. W. Duvall for appellee.
4. A widow is not entitled to dower in the land of her husband sold under execution to pay the purchase money, for which a lien existed. Poor, &c. v. Leavell, &c. March 29, 1884. Washington Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. John W. Lewis for appellants; W. E. Riley and W. B. Harrison for appellees.
5. Partnership property—By a partnership agreement it was provided that in case of the death of either of the partners the survivor or survivors should take and inherit the portion of the deceased partner unless he should have lawful issue, and in that event that such issue should have the portion left by him.

   Held—That upon the marriage of one of the partners and the birth of a child the right of survivorship in the others was terminated, and the wife acquired a contingent right of dower of which she could not be divested by a subsequent contract between the parties, nor could the enjoyment of that right be postponed by such a contract. Having acquired the right of dower it could not be barred, forfeited or relinquished except by her own act.
6. Dower defined—Dower consists in the use, during the life of a widow, of one-third of the real estate whereof the husband was seized in his own right at any time during coverture, and which would be inherited by any child born of the marriage; it not being necessary, however, that there should actually be a child born. Casky v. Casky, &c. March 15, 1884. Christian Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. H. A. Phelps & Son for appellant.

Estoppel—See Price v. Keeney, &c., ante, 706.

Evidence—

1. Parol testimony to contradict writing—In an action upon a written contract for the unconditional payment of money, evidence tending to show a contract to pay upon condition was properly excluded, the effect of the evidence being to contradict the writing. Jaudes, &c. v. Fisher, &c. March 5, 1884. Boyd Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. R. C. Burns for appellants; John W. Hampton for appellees.
2. Records—Title—Where a party is claiming title to land by reason of his purchase at a commissioner's sale, a complete transcript of the record in which the judgment was rendered is not necessary to prove the title. So much of the record as shows the judgment ordering the sale, the purchase by the claimant, and that the parties were before the court, is sufficient. Jones, &c. v. Spalding, &c. March 11, 1884. Fleming Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. J. Hendrick for appellants; Cole & Davis for appellees.

Feme Sole—See Husband and Wife, 4.

Fraud—

W. sold land to E. and procured E. to execute to G. the note for the purchase money, G. agreeing to hold the money in trust for W. in order to place it out of the reach of W.'s creditors, he being involved in debt. W. assigned a part of this demand, and by successive assignments the appellant became the owner of that part of the debt. The appellant filed his petition in equity, alleging these facts, and that G. had collected from E the debt and failed to pay the same over, and prayed judgment against G. for the part of the debt assigned to him. The petition did not allege that the dlaintiff, or any of the assignees through whom he claimed, were ignorant of the fraudulent contrivance by which the note was executed as it was.

Held—That the petition was properly dismissed. A chancellor will give no assistance to either party, except for the purpose of defeating such fraudulent practices; he never aids either in enforcing them. Butts v. Goodan's Ex'or. March 12, 1884. Rowan Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Z. T. Young and H. L. Stone for appellant; James E. Clarke for appellee.

Frauds, Statute of—

1. Sale of standing trees—While standing trees are regarded as a part of the realty until severed, a writing is not required to take a contract for their sale out of the statute of frauds where the sale is made in contemplation of their immediate separation from the soil by either the vendor or vendee, this being considered a constructive severance of them, but no title passes under such a contract until the trees are marked and designated.
2. A contract for the sale of trees which does not fix the county or State in which the trees are supposed to be, or fix with any certainty the place of their delivery, or the price to be paid, is too indefinite to fix any liability upon the vendor for failing to deliver the trees. Hunter, &c. v. Burchett, &c. March 19, 1884. Clinton Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. D. Brent for appellants; Sandidge & Craddock for appellees.
3. Boundary—A verbal agreement fixing a dividing line is binding, particularly when acquiesced in by the parties for many years. Thacker v. Crawford, &c. March 4, 1884. Lee Cir. Ct. Opin. by Pryor, J., reh'g granted and reversed. H. C. Lilly & Son for appellant; John L. Scott for appellees.

Fraudulent Conveyance—

Assignment for benefit of creditors—Where the estate conveyed by a deed of assignment purporting to be for the benefit of creditors is more than sufficient to pay all the assignor's debts, the intention to hinder and delay creditors is manifest, and the conveyance is fraudulent. Turley v. Alphin, &c. Same v. Same. Ford's Adm'r v. Turley's Tr. Lillard v. Same. March 13, 1884. Gallatin Cir. Ct. Opin. by Pryor, J., Ct. Ap. First two cases affirmed and last two reversed. Winslows and Warren Montfort for Turley; J. J. Landram for Ford and Lillard.

Guaranty—

Notice of acceptance—When a guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option of the party to whom the application for credit is

made, the grantor must, within a reasonable time, be notified of the acceptance of the guaranty, but when the guaranty is an absolute, present guaranty, complete in its terms, fixing the liability of the guarantor, and is not a conditional agreement, it takes effect as soon as acted upon, and no notice of acceptance is necessary. Long v. Hemphill, &c. March 12, 1884. Daviess Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Weir, Weir & Walker for appellant; W. N. Sweeney & Sons for appellees.

Guardian and Ward—See Bonds, 2.

Highways—

1. Turnpikes—Lateral roads—The mere construction of a pike and opening it for public travel does not have the effect of discontinuing a dirt road between the same places. Section 13 of chapter 110, General Statutes, does not execute itself; it confers power on the county court, and possibly makes it an imperative duty to discontinue lateral roads embraced by the statutory provisions; but until that power is exercised, or that duty is performed, the road continues to exist as a public highway.
2. Erecting fence across—Section 41, article 1, chapter 94, General Statutes, which prescribes a penalty against one who erects, or causes to be erected, a fence in or across a public road, and also against an owner or occupant of land who fails to remove such fence after notice from the surveyor, does not affect the common law right to abate the nuisance.
3. Gates—Sections 2, 13, 14 and 15 of article 1, chapter 94, General Statutes, apply only where gates have been erected across public roads under orders of the county court.
4. Obstruction of highway—Closing a highway is a common nuisance which may be abated by anyone actually obstructed, but the removal of the obstruction must not involve a breach of the peace; it must inflict as little injury as possible; it must extend no further than to remove the nuisance, and where the person to be affected by the removal did not actually commit the nuisance, but only failed to remove it, he is generally entitled to notice to remove. Hurst v. Cassiday, &c. March 26, 1884. Fleming Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. W. H. Cord and Andrews & Sudduth for appellant; Cassiday & McCartney for appellees.

Husband and Wife—See Judicial Sale—

1. Creditors—An insolvent husband sold his wife's real estate and reinvested the proceeds from time to time until he had added largely to her estate, all of the trading and speculating being done by the husband without the knowledge of the wife, although he secured to her the property until the deeds to the land in controversy were made. These deeds he had made to himself and wife jointly without the knowledge or consent of the wife. The interest of the husband was sold under execution to satisfy a judgment against him, obtained many years prior to the execution of the joint deeds, and the purchaser seeks a partition.

Held—That from the labor of a lifetime the husband ought, at least, to have accumulated a sum sufficient to entitle him to some interest in the estate, "and when this interest is created by the execution of conveyances that vested him with the title to a part of this land, although as between the husband and wife it may have been, and was, regarded as

trust property, as to the creditor it should be sold to satisfy his debts," but there should be a resale of so much for the husband's interest as will pay the execution creditor, and the balance secured to the wife for her own use. Robinson v. Anderson, &c. March 29, 1884. Fleming Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Reid & Stone for appellant; W. H. Cord, W. J. Hendrick and M. M. Teager for appellees.

2. Creditors—The purchaser at a judicial sale made to satisfy a vendor's lien bought with the purpose to secure the property to the wife and children of the debtor, and after selling a portion of the property and realizing all he had paid except a small sum, agreed to convey what remained of the property to the wife and child of the debtor if the latter would pay him the balance expended by him on his purchase, which was done, and the conveyance made accordingly. The creditors of the husband seek to subject the property to the payment of his debts.

   Held—That the entire estate passed from the debtor by the judicial sale, and the subsequent conveyance to his wife and child did not revive his rights or the rights of his creditors, but the chancellor acted properly in subjecting the property to the extent of the payment by the husband. Simpkinson & Co. v. Pierce, &c. March 29, 1884. Trimble Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. D. H. French and Wm. Carroll for appellants; Trout & Peak for appellees.

3. Where the husband receives the general estate of the wife his parol promise made to her at the time to secure her is not enforceable against his creditors. Turley v. Alphin, &c. Same v. Same. Ford's Adm'r v. Turley's Trustee. Lillard v. Same. March 13, 1884. Gallatin Cir. Ct. Opin. by Pryor, J., Ct. Ap. First two cases affirmed and last two reversed. Winslows and Warren Montfort for Turley; J. J. Landram for Ford and Lillard.

4. Feme Sole—In every case where husband and wife petition the chancellor to empower the wife to trade as a feme sole, if the petitioners have satisfied the chancellor by proper evidence that the application is not made with the intention to injure the husband's creditors, a decree should be entered in accordance with the statute. It matters not that the husband is not insolvent, and that the application is made simply to make the wife more independent of the husband in the control of her estate. Haggard, &c., on Petition. March 12, 1884. Shelby Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. L. A. Weakley for appellant.

Instructions—

A defendant has no right to ask for an instruction to be given "in behalf of the plaintiff." Ballou v. Wilmot. March 12, 1884. Shelby Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. L. A. Weakley for appellant.

Interest—See Judgments, 2, 6.

Judgments—

1. Description of land—"A judgment directing a sale of land should be so certain and specific in the description of the land, as well as in the duties to be performed by the officer, as would enable that officer to perform those duties without reference to or inspection of any other paper or pleading in the cause." It is not sufficient to direct the commissioner to sell the property "in the petition mentioned."

. Interest—A judgment allowing interest must fix the date at which it is to commence and end. A judgment for a certain sum with interest "after date of maturity" until paid, is to indefinite to be valid for any purpose. Pumphrey v. Rafferty. March 5, 1884. Nicholas Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. W. P. Ross for appellant; Holladay for appellee.

3. Reversal—Restitution—Money paid under a judgment in equity which is afterwards reversed may be recovered by rule against the party receiving it. The right to recover does not rest on the ground that it was wrongfully collected, but on the ground that the authority under which it was collected has ceased to exist, and that, therefore, the party is bound in conscience to return it to the rightful owner.

2. There may be a good reason why the person receiving money under a judgment subsequently reversed should not be required to restore it, as where, acting in a fiduciary character, he has paid it out under a decree to designated persons.

4. Extent of restitution—The restitution should extend to all that has been collected, without regard to the costs incurred in procuring and enforcing the reversed judgment, and the fact that the party collecting the judgment did so as assignee in bankruptcy does not alter the rule.

5. Title to property—The title to property purchased at a judicial sale is not affected by a subsequent reversal of the judgment, although the party holding the judgment be the purchaser, but the party should not be compelled to accept the benefit of this rule, intended merely to protect a purchaser, especially in a case where a surrender of the right bid for is both in theory and in fact an exact restitution, as where the party is simply the accepted bidder for the equity of redemption. Nor does such a case fall strictly within the rule as the bidder acquires no title, but merely a lien.

6. Interest—It was error to charge the appellant with interest on the amount of the reversed judgment collected by him. Holding the judgment as assignee in bankruptcy, when he collected the money his duty required him to keep it until ordered by the court of bankruptcy to pay it out. Dudley, Ass'ee v. Beatty. March 5, 1884. Montgomery Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Reid & Stone for appellant; J. J. Cornelison for appellee.

7. Where a demand has been merged in the judgment of a sister State no cause of action can be supported in this State except upon the judgment, which has the force of a domestic judgment. Morris, &c. v. Robinson, &c. March 19, 1884. Lou. Ch. Ct. Opin. by Reid, P. J., Sup. Ct., rev. R. H. Thompson for appellants; W. O. & J. L. Dodd for appellees.

Judicial Sale—See Husband and Wife, 1.

Lien—See Vendor and Vendee, 1.

Limitation—

1. Date of partial payment—Where a partial payment indorsed upon a note is shown to have been made before the cause of action was barred by limitation the indorsement is competent evidence for the obligee that the amount indorsed was paid at the date of the indorsement. Harmon, &c. v. Johnes. March 19, 1884. Martin Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. S. Patten for appellants.

2. The statute of limitation ceases to run from the time a summons is issued upon the petition or appearance of the defendant is entered in the action. Ballou v. Wilmot. March 12, 1884. Shelby Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. L. A. Weakley for appellant.
3. Pleading—In pleading the statute of limitations the facts constituting the bar must be definitely alleged. It will not do to allege simply that the requisite time has elapsed "since the cause of action has accrued," but the pleader must go further and state that it elapsed before the claimant commenced his action thereon, or if it is a set-off, that the time had elapsed before the plaintiff commenced his action, or that it had elapsed since the last step in the prosecution of the action. Jones v. Jones' Adm'r. March 26, 1884. Fleming Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. W. H. Cord for appellant; Cassiday & McCartney for appellee.

Married Woman—

When she is sued on her contract it must be alleged that she had power to make it. Price v. Kenney, &c., ante, 707.

Mortgage—

Description of debt—While literal exactness in describing in a mortgage the indebtedness is not required, the description of the debt should be full enough, as to the amount of the debt intended to be secured, to enable creditors and purchasers by reasonable diligence to discover it. Morris, &c. v. Murray. March 8, 1884. Franklin Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. John & J. W. Rodman, A. J. James and W. P. D. Bush for appellants; D. W. Lindsey, W. Lindsay and A. Duvall for appellee.

Municipal Corporation—

1. Liability for improvement of streets, see Trustees of Belleview v. Hohn, &c., ante, 730.
2. A municipal corporation may be trustee of charitable use. Peynado's Dev. v. Peynado's Ex'or, ante, 753.

Negligence—

1. Willful—Damages—In estimating damages for willful neglect the jury can take into consideration evidence in regard to the decedent's capacity to earn money, and hear proof of the ages and number of his children.
2. Contributory—The general rule is that where willful neglect is proved the defendant must answer in damages, notwithstanding the contributing fault of the decedent; but there are exceptions to the rule, as where the person injured, knowing of the defendant's willful neglect, voluntarily, with the intention to cause his own injury, placed himself where the injury could not be avoided. Coal Road Construction Co. v. Tipton's Adm'r. March 5, 1884. Opin. by Richards, J., Sup. Ct., rev. W. H. Holt for appellant; H. L. Stone for appellee.
3. Railroad may eject passenger refusing to pay fare, but must be done with due regard to his health. Louisville, &c., R. R. Co. v. Sullivan, ante, 722.
4. For willful, both compensatory and punitive damages recoverable. See Louisville, &c., R. R. Co. v. Brooks, ante, 749.

Nuisance—See Highways, 2, 4.

Officers—

Liability of ministerial and judicial officers. See Pepper v. Mayes, &c., ante, 708.

Parties—See Bonds, 1, 3.

Partnership—See Dower, 5—

1. Ill health of partner cause for dissolution—The fact that a partner has lost his health or strength, or does not possess the skill necessary for the proper execution of the work he undertook to do, is a sufficient cause for the dissolution of the partnership.

   Where, by a partnership agreement, it was provided that from the date of the death of either of the partners the survivor or survivors should continue the partnership for the term of seven years, or until the death of all of them, the fact that the partnership estate is being wasted by reason of the fact that the sole surviving partner is incapable of managing the estate by reason of his age and mental and physical condition, it is a sufficient cause for the settlement of the partnership affairs upon the petition of the widow of one of the deceased partners.

2. Partnership real estate treated as personalty—Where real estate is purchased with partnership funds and used as partnership property it should be treated as personalty for all purposes, where such an agreement or intention appears from the nature of the partnership business, the character and extent of the real estate involved and the partner's mode of treating and considering it, but in the absence of such facts and circumstances as will warrant the court in finding that it was so intended or agreed by the parties it should be regarded as personalty for the purposes of partnership only, and after these are answered the surplus should be held to be real estate for all other purposes. The mere purchase of lands with partnership money and their use for the purpose of carrying on the partnership business of farming furnishes no sufficient evidence of an intention on the part of the partners to convert the land into personalty for all purposes. Casky v. Casky, &c. March 15, 1884. Christian Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. H. A. Phelps & Son for appellant.

3. A partner can not recover for services rendered the firm without a special agreement.

4. Interest—A partner can not claim interest until after settlement. Glenn v. Sims. March 26, 1884. Nicholas Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. P. Ross for appellant; Kennedy & Kennedy for appellee.

Patents—

Conflict—When patents conflict as to boundary the first entry and claim, in the absence of an actual occupancy and inclosure within the interference, must prevail. Thacker v. Crawford, &c. March 4, 1884. Lee Cir. Ct. Opin. by Pryor, J., Ct. Ap., reh'g granted and reversed. H. C. Lilly & Son for appellant; John L. Scott for appellees.

Personal Representatives—

1. Surcharging settlement—In an action to surcharge a county court settlement for failing to charge an administrator with uncollected debts the petition must allege that the debts have been lost to the estate by his negligence or misconduct.

2. Extent of liability—Personal representatives are liable for the management of their trusts, as bailees and agents, and are only required to answer for such losses as are occasioned by actual or constructive negligence or willful misconduct. Carrico, &c. v. Brummel, &c. March 26, 1884. Ballard Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. D. Wilds for appellants; W. G. Bullitt and Bugg & Bishop for appellees.

Pleading—See Bankruptcy, 1, 2; Bonds, 1, 3; Limitation, 3; Personal Representative, 1, 2—

1. New promise—Bankruptcy—An allegation that the defendant had within the five years last past repeatedly agreed and promised to pay the debt to plaintiff was a sufficient allegation that the promise to pay was after the defendant's discharge in bankruptcy, which was granted more than five years before the filing of the petition. Booth v. Wood. March 26, 1884. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. G. W. Ray for appellant; Weir, Weir & Walker for appellee.
2. Petition on account—In an action on an account the petition must allege either that the defendant promised to pay the amounts charged for the items or articles furnished or that the articles or items furnished were reasonably worth the amounts charged. Doyle v. Pike, &c. March 26, 1884. Fleming Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. W. H. Cord for appellant; W. J. Hendrick for appellees.
3. Necessity of reply—In an action to recover the amount of two notes, alleged to have been collected by the defendant as trustee and agent of the plaintiff, the answer admitted the collection, but denied that it was made as trustee or agent of the plaintiff, and alleged that the defendant had, prior to the collection, purchased the notes from the plaintiff.

   Held—That the affirmative allegation in the answer, that the defendant had prior to the collection purchased the notes, was superfluous, it being simply another form of stating that the fundamental averment of the petition was not true, and no reply was necessary. Gaines v. Corbin, &c. March 26, 1884. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Pryor & Chambers for appellant; D. A. Glenn for appellees.
4. If the facts as alleged show fraud, not necessary to denominate them in terms fraudulent. Pryse v. McGuire, ante, 717.

Pleading and Practice in Criminal Cases—

1. Continuance—The court properly refused a continuance on account of the absence of witnesses, as the accused did not seem to know where the witnesses could be found, and failed to present any state of fact that would enable the court to conclude that there was even a possibility of ascertaining where they lived or of having them before the court at a subsequent term. Smith v. Commonwealth. March 29, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. John L. Scott for appellant; P. W. Hardin for appellee.
2. Pleading and practice in criminal cases—Although the instructions in this case were erroneous the court can not determine, in the absence of the evidence, whether they were prejudical. Ford v. Commonwealth. March 11, 1884. Crittenden Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. Nunn & Cruce for appellant; P. W. Hardin for appellee.

Practice in Civil Cases—

1. Causes of action—Election—The cause of action set up in the amended petition being separate and distinct from that sued on in the original petition the plaintiff should have been required, upon motion of defendant, to elect which cause of action he would prosecute. Greene v. Magowan. March 19, 1884. Montgomery Cir. Ct. Affirmed by divided court, Reid, P. J., not sitting. Opin. by Bowden, J., Sup. Ct., for reversal.
2. Verdict not supported by evidence—It is only where the court can fairly say that the verdict could not have been the product of the jury's judgment, but was the result of such passion or prejudice, or of such mistake as to the nature and force of the evidence as to have precluded the sober action of the judgment, that the court can set the verdict aside as contrary to the evidence and order a new trial. The verdict in this case should have been set aside. Chicago, St. L. & N. O. R. R. Co. v. Lamkin. March 19, 1884. Hickman Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. N. P. Moss for appellant.
3. Election of special judge—Failure to except—Where the records show that a special judge was elected and qualified, and no objection or exception appears, the validity of the election can not be questioned for the first time on appeal by assignment of errors.
4. Failure of judge to sign orders—If the appellant desires to attack interlocutory orders because they have not been signed by the judge he must move in the lower court to have them vacated. He can not make the objection for the first time in the appellate court. Moore's Ex'or v. Moore. March 12, 1884. Laurel Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. R. L. Ewell for appellant; W. O. Bradley for appellee.

Prohibition, Writ of—

Issues to prevent a court from proceeding in a matter beyond its jurisdiction. Bank Lick Turnpike Co. v. Phelps, &c., ante, 713.

Railroads—See Louisville, &c., R. R. Co. v. Sullivan, ante, 772.

Killing of stock—Negligence presumed—In an action against a railroad company for the killing of stock the presumption is that the killing resulted from the defendant's negligence; but after the defendant's servants in charge of the train have purged their consciences by testifying that proper care was taken, and they are unimpeached, the force of the statute is exhausted, and it becomes indispensable to the plaintiff's right to recover to show the existence of negligence in fact. Chicago, St. L. & N. O. R. R. Co. v. Lamkin. March 19, 1884. Hickman Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. N. P. Moss for appellant.

Release—

One of several obligors—A receipt executed by the obligee in a note to one of several obligors for a certain amount, "in full of his part" of the note, is not such a release of the obligor to whom it is executed as will release the other obligors. Such a paper legally imports no more than an agreement not to look to the obligor to whom it is executed, provided the other obligors pay their proportionate part of the debt. Moore, &c. v. Gatewood. March 19, 1884. Allen Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. W. L. Porter, Jno. H. Walker, B. W. Bradburn and Chas. B. Johnson for appellants; L. McQuown for appellee.

Street Improvements—See Trustees, &c. v. Horn, ante, 730.

1. Pleading—Publication of ordinance—In an action to subject property to the payment of assessments for street improvements it must appear affirmatively from the petition that every step necessary to create the lien has been taken. The petition must set out the specific facts, showing when and how the tax ordinance was published, and in what kind of newspapers. It is not sufficient to aver that "the publication was made according to law."
2. The petition should allege specifically when and how and in what daily newspaper the notice was given by the city engineer of the time and place for the inspection and reception of the work by him. An allegation that the work, "after due advertisement as required by law was duly inspected by the city engineer of Louisville and was by him approved and received," is not sufficient. Dunn, &c. v. German Security Bank. March 5, 1884. Lou. Chy. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Elliott & Hemingray for appellants; Gibson & Gibson for appellee.

Supersedeas—

Suspends all proceedings for enforcement of judgment. Johnson v. Williams, ante, 733.

Sureties—

When obligors appear upon the face of a writing to be principals, when in fact one is surety for the other, as between themselves they are not estopped from showing their true relation to the paper. Green v. Magowan. March 19, 1884. Montgomery Cir. Ct. Affirmed by divided court, Reid, P. J., not sitting. Opin. by Richards, J., Sup. Ct.

Taxation—

1. After property has passed into the hands of innocent purchaser it can not be sold for taxes until demand and notice have been made. See Quinlan v. Callahan, ante, 719.
2. When tax is due—A tax can not be said to become due until the property is assessed, and under the amended charter of the city of Covington, which provides that no suit shall be brought unless the taxes have been due and unpaid for more than six months, that time is to be estimated from the date of the assessment.
3. The collection of taxes can not be enforced by a suit in equity when the remedy provided by statute is ample and complete. City of Covington v. Wilcox's Ex'or. March 1, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. T. F. Hallam for appellant; Collins & Fenley for appellee.

Trusts—

1. Equity will control trustee. Cromey, &c. v. Bull, &c., ante, 735.
2. Trustee must use ordinary care in making investments. Ib., 735.

Usury—

Pleading—It is not necessary to plead and rely on the statutes against usury either in equity or at law, contracts to pay more than legal interest being void. Newman v. Bradford. March 12, 1884. Pendleton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. Simon & Bonar for appellant; Clarke & Applegate for appellee.

Vendor and Vendee—

1. Title—The release of a lien on land by the heir of the lien holder, instead of his personal representative, makes the title good in the absence of any allegation by the vendee that an administrator has ever been appointed, or that any demands exist against the estate. Poor, &c. v. Leavell, &c. March 29, 1884. Washington Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. John W. Lewis for appellants; W. E. Riley and W. B. Harrison for appellees.
2. Liability of vendor for misrepresentations as to title. Pryse v. McGuire, ante, 716.

Warranty—

Breach of can not be set up in action for purchase money. Pryse v. McGuire, ante, 717.

Will—

Intention of testator will be executed. Peynado's Dev. v. Peynado's Ex'or, ante, 753.

# KENTUCKY LAW REPORTER AND JOURNAL

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## CURRENT TOPICS.

The last volume, 109, of U. S. Sup. Ct. Reports covers a period of three months, October 15, 1883, to January 7, 1884, and in that time shows ninety cases decided by the court. Of these the Chief Justice decided twenty, Judge Blatchford thirteen, Matthews thirteen, Woods twelve, Gray nine, Bradley six, Harlan six, Miller six, and Field five. There were twelve dissenting opinions, of which no less than five were by Judge Harlan, three by Field, two by Gray and one each by Miller and the C. J. The longest opinion in the volume is that in the Civil Rights cases, U. S. v. Stanley, which covers fifty-nine pages, of which thirty-six pages are devoted to Judge Harlan's dissent. The C. J. has recently entered an order directing the reporter to issue an extra volume on account of the unusual number of decisions made by the court in the last year.

A revolution should be made in the make up of our law books. There is no need to bind them in sheepskin, sides and backs alike. There is little or no wear on the sides of a book. The stress is on the back and corners. Let these be done up in calf skin and the sides in muslin. Then again the use of the Roman numerals should be abandoned. They have already been exchanged for the Arabic by many of the older States,

Massachusetts, New York and Pennsylvania, and in the U. S. Sup. Ct. Reports. Thus, 109 U. S., 49 Penn St., are more readily intelligible than CIX U. S., and XLIX Penn. St. Let the next volume of Ky. Reports be numbered in this manner.

The Sup. Ct. of Ia. has recently decided, in State v. Carman. 18 N W. Rep., 691, that a defendant in a criminal case can not waive his right to a jury trial. They reason that as the Civil Code of the State contains a provision authorizing the waiver and the Criminal Code contains no such provision that the difference is significant, and excludes the jurisdiction of a court to try indictments without a jury—that life and liberty are too sacred to be placed at the disposal of anyone man—that the innocent unduly confident of his innocence might make the waiver to his own destruction; that the following decisions reject the waiver: Hill v. People, 16 Mich., 351; State v. Maine, 27 Conn., 281; Wilson v. State, 16 Ark., 601; League v. State, 36 Md., 259; Williams v. State, 12 Ohio St., 622; People v. Smith, 9 Mich., 193; Cancemi v. People, 18 N. Y., 128.

There is a dissent by one judge who relies on various criminal cases in which the waiver of other rights has been sustained. Thus in State v. Polson, 29 Ia., 133, the accused was held to his waiver of the right to be confronted with the witnesses against him, and in State v. Kaufman, 51 Ia., 578, to his waiver of a jury of twelve and agreement to be tried by eleven, if eleven are competent to try him, why not six, five, four or one? He may plead guilty, which is a waiver of all trial, why may he not then be tried by the court? In Ky., in Murphy v. Commonweath, 1 Met., 365, which was an indictment for betting on an election, the defendant agreed to a jury of eleven, was convicted and fined $100; on appeal he was held bound by his agreement to the eleven jurors. The court said that he could have bound himself by such an agreement in a civil case and the indictment involved only $100, what might have been in question in a civil suit. This reasoning leaves us in doubt about the conclusion if the punishment had been heavier or of a different kind, such as imprisonment. In the Iowa case the offense was an assault with attempt to commit

murder, and the sentence confinement in the penitentiary for two years.

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Some very rigorous law has been laid down and a very severe sentence imposed in the case of Earl of Lonsdale v. Yates, recently decided by the Queen's Bench Division, our acquaintance and visitor of last summer, Lord Coleridge presiding. It was an action for libel, the defendant, who was editor of the World, having published the following, that "a story is in circulation in sporting circles to the effect that a young lady of high birth has eloped with a young peer, whose marriage was one of affection, but whose life has fallen into bad health. The elopement took place from the hunting field; the gentleman is a master of hounds." The defendant testified that the piece had been sent in by a contributor; that he had not seen it until he read the proof, and that even then he had no idea as to who the parties referred to were, and he especially relied on the fact that no names were mentioned; that he had afterwards in every way tried to correct the impression (if any such had been made) that plaintiff was the person referred to. His Lordship sentenced the defendant to four months' imprisonment. He denominated the World a "society paper" dealing in the most utterly attenuated personalities; that although defendant said he did not believe the paragraph applied to the plaintiff, yet he did not state to whom it did apply or that it applied to anyone, so that he "shot his bolt" at random, taking the chances of its striking and cruelly wounding some passerby. Like the person who wantonly hurls a bomb into a crowd and injures a mere stranger, he is liable as if he had intended the injury. This will be considered rigorous doctrine here, but it is just. The press should be taught to distinguish between liberty and license.

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In our eagerness to protect the life and personal liberty of the innocent, we have carried the power of juries in criminal cases entirely too far, so far in fact that it is now all but impossible to convict the guilty. It is time to call a halt.

In the first place the character of juries in the criminal courts should be improved. It is a notorious fact that juries in criminal cases are less intelligent, less representative of the sense and justice of the community than those that sit in civil cases. Now the difference, if there is to be any difference, should look the other way. The practice of summoning bystanders should be changed. All can see, at once, the fearful danger to the purity of jury trials if this practice is allowed to continue. What better chance does a corrupt party want than to have the court room well filed with his partisans and friends from whose ranks each vacancy in the regular panel can be filled as rapidly as it occurs. A bill has been recently introduced into the house to reduce the number of peremptory challenges allowed the defense to eight. It is now twenty. This is a wise change, but the bill still recognizes the practice of summoning bystanders as jurymen. We suggest an amendment requiring vacancies to be filled from the regular panel. Then again no one should be excused from the jury merely because he has read accounts of the crime from the newspapers. No one should be excused for cause unless he will swear that he does not believe himself capable of trying the case fairly and free from prejudice. We hope to see the legislature take hold of this matter, and raise the law above reproach into which it has fallen.

In this connection it may be mentioned that the proportion of acquittals in the United States in jury trials is three times as great as in England, and ten times as great as on the continent, and that there is no country in which convictions for murder are so rare as in this.

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An agreement to pay lawful interest in advance is usurious, as where A borrows $10,000, but receives only $9,400, the interest being deducted, and gives his note for the whole $10,000. It was contended that the statute fixes the rate of interest and not the time of payment; that a contract to pay interest semi-annually is not usurious. But it was answered if the interest is deducted in advance the borrower pays for the use of money which in fact he has not used. A distinction is made, however, in favor of banks. On account of their short loans they

are allowed to deduct interest in advance. (Ins. Co. v. Carpenter, 39 Ohio St., 264.)

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A daughter has no insurable interest in the life of her mother (Continental, &c., Ins. Co. v. Volger, Sup. Ct. Ind., 18 Cent. L. J., 229). In an interesting note appended to the case it is said to have always been seriously questioned whether relationship establishes an insurable interest in the life of the relative. But the authorities cited do not seem to be in full and perfect harmony on the subject.

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There has been at least one, but we believe only one, jury trial in the U. S. Sup. Ct. It took place at the Feburary term, 1794, in the case of Georgia v. Brailsford, Chief Justice Jay presided, and is reported as laying down some very incorrect law. He is made to say that the jury are to determine the law as well as the facts, and then proceeds (according to the report) rather absurdly to tell them that the facts in that case are all agreed; that the only question is one of law, and upon that the whole court are agreed. Where so much was agreed it does not clearly appear why the case was left to the jury at all. The accuracy of the report is questioned by Judge Curtis, in U. S. v. Moore, 1 Cur. Cir. Ct., 23.

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The peculiar feature of the bills introduced into congress for the relief of the U. S. Sup. Ct. is that they create an intermediate court between the circuit courts and the Sup. Ct., to be called the U. S. Ct. of Appeals, to which that large class of cases is confined where the sole ground of Federal jurisdiction is the fact that the parties are citizens of different States; this class of cases stops in that court; they can not be appealed to the Sup. Ct. It is said that the docket of the Sup. Ct. now numbers 1,200 cases annually, and 400, or one-third of them, are citizenship cases. The change proposed will, therefore, bring considerable relief in that court. The new court will sit, as one bill provides, in Washington or, as in another, at New York, New Orleans, San Francisco and Chicago.

## THE ASSAULT ON JUDGE REID.

It was very appropriate upon the recent occasion of the unveiling of the Elliott monument that the distinguished gentleman chosen to deliver the address on that day should condemn at length and in no qualified terms the personal assault so recently made by a disappointed lawyer upon an eminent judge of this State. It was peculiarly appropriate that the act should be condemned and the public duty on this subject defined in that presence where the governor, legislature, judges and the chief officers of the Commonwealth were assembled, and it is to be hoped that what was then said will urge the legislature to pass the bill which has been offered them. Will they postpone it until its necessity has been demonstrated by another such incident? It is strange that the grand jury of the locality where this outrage occurred have ignored the whole matter; that the courts and the bar throughout the State have failed to notice it. As to whether the assailant, Cornelison, can be disbarred is indeed a question. But let the question be raised; let the attempt be made. There is one case which would sustain the right to disbar: Ex parte Wall, 107 U. S., 265, where an attorney who took part in a riot was disbarred for so doing, because his act was in contempt and violation of the peace, law and order of the community.

But there seems the oddest disposition in this community to leave the settlement of such affairs to the prowess of the individuals concerned. Any appeal to the law for reparation is considered as a confession of weakness. It is true that the indignity to which Judge Reid has been subjected can not be overestimated, but for this very reason the magnitude of the offense demands reparation from the law, yet one will hear it said the outrage is too great a matter to be left to the law. The sufferer must right himself. The law is not strong enough. His own greater powers are called for. Could there be greater presumption or a sentiment more characteristic of a barbarous people where law is weak and individuals strong? The law should be stronger than any 10, than any 100 men. But it is said this strength of the law is mere theory. We know in fact that law is weak and the chances of escape for the culprit are

many, and punishment, even if administered, is inadequate. That is indeed true, but the only mode of strengthening the law is that all should look to it and rely on it—great and obscure—strong and weak alike. When it shall become the last and only refuge of all, then it will develop the strength it ought to possess. And as it becomes our only protection, so it will become an adequate and sufficient one. This is the normal, healthy tendency of all civilized communities where the law is professedly supreme.

If public sentiment demands anything else of a man than that he should look to the law to redress his wrongs it is lawless and wrong. It rises above the law, and it is time some one should come forward to oppose it and restore it to that subjection to the law which is its proper place. To whom can we look for such resistance so rightfully as to a judge? There is no lack of physical courage in this community, but there is a most shocking want of moral courage on this particular question. All men condemn a resort to brute force, yet none dare restrain himself from resorting to it. All basely yield to a wrong-headed public sentiment instead of rising above and bravely trying to guide it. Judge Reid has placed himself on this high plane, and we hope to see him receive that support at the hands of the community which the idea he represents and his own past ability and worth merit. Life is full of opportunities for the exhibition of courage where it will be both a noble and useful quality displayed in the performance of duty in calmly facing the inevitable. Let it be reserved for such an occasion.

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## KENTUCKY COURT OF APPEALS.

## BALL v. COMMONWEALTH.

(Filed April 10, 1884.)

**Burden of proof—When the accused pleads not guilty the Commonwealth assumes the burden of proof as to all the facts necessary to conviction. Malice must be proved, but not the sanity of the accused. The burden is on the accused to prove his own insanity or any other fact relied on by him as a defense, though he is not bound to establish it beyond a reasonable doubt (disregarding 1 Met., 376), but only by a preponderance of evidence as in civil cases.**

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hines.

On an indictment for murder appellant was found guilty of manslaughter, and sentenced to the penitentiary for four years.

There was some proof tending to show insanity in appellant and it is upon the law in reference to the burden of proof in such cases that the main question arises. The instruction by the court below placed the burden of establishing insanity, by preponderance of evidence, upon appellant, while it is contended that sanity, being an essential element in the crime charged, should be established by the Commonwealth, to the exclusion of a reasonable doubt, as any other fact necessary to make out the crime.

If we were in any doubt as to the correctness of the court's ruling we would nevertheless approve it on the authority of the decisions and long practice in this State. In the case of Graham v. Commonwealth, 16 B. M., 587 (1855), the law was announced as in the instruction by the court below, and that case has been followed by Smith v. Commonwealth, 1 Duvall, 224, by Brown v. Commonwealth, 14 Bush, 401, and many others. But we have no doubt that the ruling is correct on principle.

The Criminal Code, section 172, authorizes three pleas to an indictment: Guilty, not guilty, and former conviction or acquittal, but it does not restrict the defenses that may be made to the specifications of that section. The plea of not guilty puts in issue every fact necessary for the Commonwealth to establish in order to a conviction, and as to all those facts or issues the burden of establishing them by proof that excludes reasonable doubt remains with the Commonwealth; but when the accused relies upon some separate matter of defense not embraced in those issues the burden of proof to establish such matter is on the accused. Contrary, however, to the statement, in Payne v. Commonwealth, 1 Met., 376, that such pleas must be established to the satisfaction of the jury, beyond a reasonable doubt, we are clearly of the opinion that the accused is only required to establish such defenses by a preponderance of the evidence as in civil cases, because such evidence necessarily creates a doubt as to the guilt of the accused which always entitles to an acquittal, no matter what issues are pre-

sented or how presented. If then existence of sanity is not a matter put in issue by the plea of not guilty, and is a separate defense independent of the main charge, the burden of proof to establish it, to the extent of a preponderance of the evidence, is on the accused. Every man being presumed to be sane like the presumption of innocence, such presumptions must continue until overthrown—in the first instance by a preponderance of evidence introduced by the accused, and in the other by evidence for the Commonwealth, so strong in its character as to exclude all reasonable doubt. What the law presumes to exist need not be alleged or proved, as, for instance, sanity, but whatever is not presumed to exist and is essential to complete the charge must be alleged and proved. This is not, as insisted by counsel, analogous to the law requiring malice to be proved by the Commonwealth as any other fact essential to conviction. Both malice and sanity are essential ingredients in the crime of murder, but the one is not presumed by the law to exist, and the other is. The law of this State is well established that malice is not to be presumed, but must be established by proof as any other fact entering as an element into the crime of murder. (Farris v. Commonwealth, 14 Bush, 365; Buckner v. Commonwealth, 14 Bush, 602; Trimble v. Commonwealth, 78 Ky., 176.)

This view as to the burden of proof and as to the amount of proof necessary to sustain the defense of insanity appears to be entertained by the courts of last resort in the States of Alabama, Arkansas, California, Iowa, Maine, Massachusetts, Missouri, North Carolina, Ohio, Pennsylvania, Texas and Virginia, in addition to this State. (Coyle v. Commonwealth, S. C. Penn., Am. L. Reg., volume 22, No. 3, page 191, and cases cited in note.)

We deem it unnecessary to answer in detail the objections may by counsel to the admission of testimony, for the reason that in every instance where there was error in the admission of testimony it was of such character as not to affct the substantial rights of appellant.

Judgment affirmed.

P. B. Thompson, Sr., for appellant.

P. W. Hardin and T. C. Bell for appellee.

## FRAZER'S EX'OR v. PAGE, &c.

(Filed April 17, 1884.)

**Trustees—Applying to chancellor for instructions—Reversal of judgment—A fiduciary has the right to apply to a court of equity for instructions as to his duty in the management of the trust funds. And where the chancellor, upon the application of an executor to have a will construed, declares a particular devise void, and the devisee fails to execute supersedeas or to appeal for many years, the executor, having in the meantime distributed the estate, is not personally liable to the devisee when the judgment declaring the devise void is reversed on appeal.**

Appeal from Adair Circuit Court.

Opinion of the court by Judge Pryor.

The original action in this case was instituted by the executors of Wm. Frazer, deceased, asking for a construction of his will, in order that they might distribute the estate between those entitled. All the parties in interest were made defendants, and a judgment rendered ddetermining that one of the deivsees was not entitled and a distribution directed to be made.

The court below excluded the devisee, Ermine C. Page, a daughter of the testator, upon the ground that the conditional devise to her was void. The case is reported in 14 Bush, page 207. The executors in their petition asked the chancellor, in the event the devise was valid as its payment depended upon a contingency, to appoint a trustee to hold the fund until the contingency happened, but as the devise was adjudged void no trustee was appointed.

After this judgment the executors proceeded to settle the estate and make distribution between the devisees in accordance with the judgment, and did in fact, as they allege, make a full and complete distribution.

The judgment of the lower court was rendered in the month of February, 1873, and an appeal taken in the month of May, 1875. This court reversed the judgment of the lower court in September, 1878, holding that the devise was valid, and that Ermine Page was entitled to her interest as devisee upon performing the conditions annexed to the devise and upon the contingency provided by the will. On the return of the cause to the lower court, and after filing the mandate of this court,

the executors offered to file an amended petition, setting up the fact of the distribution between the devisees as directed by the chancellor below, and insisting that the devisees who had recovered the estate should contribute to make up the interest of the excluded devisee, Mrs. Page. The object of the amendment was to make the devisees liable to Mrs. Page and not the executors.

The chancellor, proceeding on the idea that the judgment of the lower court afforded the executors no protection, ascertained the value of the entire estate and directed the executors to pay one-sixth of the amount to a trustee, to be held by him for Mrs. Page in the event of her compliance with the provisions of the will of her father, and if they failed to pay the same within a fixed period a personal liability was imposed upon them, and an execution directed to issue to be levied, not of assets in their hands as executors, but upon their own estate, and from that judgment they have appealed.

The construction of the will of the testator was the subject of controversy between the devisees and the executors, not willing to assume the responsibility of acting on their own judgment in making the distribution, sought the aid and direction of the chancellor for that purpose. All the parties interested in the estate, either for or against the validity of the devise to Mrs. Page, were brought before the court, and a full opportunity afforded them of presenting to the chancellor their views as to the proper construction of the devise in question. The executors were not expected to run the risk, or incur a pecuniary liability in adopting the views of either party upon a question involved in so much doubt, and their only means for protection was in applying to the chancellor when all the parties, including themselves, could be instructed and directed as to the manner of distribution. The chancellor said to the executors and the devisees that the devise to Mrs. Page was void, and that it was the duty of the executors to divide the entire estate between the remaining devisees.

They were compelled to obey the judgment of the court to which they had gone for advice. No appeal with supersedeas had been taken by the devisee deprived of her interest, and none prosecuted until ten years after judgment, and in the

meantime the executors had proceeded to make distribution. The right of one acting in a fiducial capacity to apply to a court of equity in cases where doubts have arisen, or exist in regard to the disposition of the funds in his hands, for instruction as to his duty, will not be questioned, and particularly when all the parties in interest have an opportunity to be heard. Having the right to apply to a court of equity for such a purpose, it would be a singular rule that would adjudge the fiduciary liable by reason of an erroneous judgment by the court, whose aid it was not only his right but his duty to invoke.

Perry on Trusts says, section 928:

"A trustee can not be expected to incur the least risk in the distribution of the trust fund, * * * so when equities are not perfectly clear the trustee may decline to act without the sanction of the court, and his acts and proper expenses will be allowed. The trustee himself will be protected by the decree of any court having jurisdiction, and exercising the jurisdiction regularly upon proper notice given, * * but if parties receive the money who are not entitled they are not protected, although the trustee paid the money to them under a decree of the court, and is protected personally by the decree."

In Loring's Adm'r v. Steineman, 1 Met., Mass., 204, the court said: "We entertain no doubt that the judgment of a proper court duly made, after such notice as the statutes require, or if they require no notice, then after such notice as the court in its discretion and under the circumstances may think proper to order, must be deemed in its nature so far conducive as to protect the administrator in good faith, in conformity to it."

The executors in this case were not compelled to appeal from the judgment, but the devisees in interest, not satisfied with the decision, should have prevented distribution by the execution of a supersedeas, or taken some steps as would protect their interests in the estate. This they failed to do, and must, therefore, look to the devisees to make up the devise and not the executors.

There is no allegation of bad faith or any other question involved except the right of the appellants to file the amended pleading. The trustee of Mrs. Page is entitled to one-sixth

part of the estate and its income, less her proportion of the expenses incurred in the settlement. If there is land to be divided, and this was the principal part of the estate, Mrs. Page or the trustee must have an equal interest with the other devisees, and they must account to the trustee for the rent, if any has been received, or its value, if used by the devisees. If the land has been sold and no division in kind can be made, then the value with the interest must be paid. As to the money distributed the trustee is entitled to one-sixth of the amount, with interest. The mode of distribution or of contribution required of the devisees will depend upon the condition of the estate received by them, and it is difficult to give any specific directions upon the facts before us. The chancellor is left to give to the trustee of Mrs. Page one-sixth of the estate, and must give it in such a manner as to make all equal. Under the provisions of the will Mrs. Page is not entitled to the principal or interest until the performance of the condition imposed, but it must be controlled by the trustee subject to the direction of the chancellor. The value of the estate as fixed by the judgment below, as well as the allowance to the executors, must all be reversed and the case left as if no judgment had been rendered. The controversy now is between the devisees, and their rights should not be determined by the judgment against the executors. This is not intended to preclude the appellees from filing any pleading in reference to the amended petition offered by the executors, seeking to make them, for proper reasons, personally liable. The amended petition offered by the executors should be permitted to be filed and the case is remanded for proceedings consistent with the opinion. The cost of this appeal, when paid by the appellees, should be charged against the estate and paid by the devisees. Judge Lewis not sitting.

Alex. P. Humphrey for appellants.

W. L. Porter and W. P. D. Bush for appellees.

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## JOHNSON v. CLEM.

(Filed April 19, 1884.)

1. Breach of peace—Where one enters on another's land and when requested to leave refuses and announces his intention, in abusive language, to remain

**and forcibly keep possession, he is guilty of a breach of the peace, and all who enter for the purpose of assisting him are equally guilty.**

**2. Practice—Trial—Witnesses—Civil Code, section 601, which provides that the judge may exclude witnesses from court room is not mandatory, but leaves to the discretion of the judge how many and what witnesses shall be excluded.**

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Pryor.

This is an action for malicious prosecution by Clem against Johnson, the petition containing two counts for distinct offenses. There was a judgment for the plaintiff and an appeal prosecuted to the Superior Court.

The brother of the plaintiff (appellee) had rented of the appellant, Johnson, a part of his land to be cultivated in wheat on the shares, and had entered into a writing evidencing the terms of the contract. The wheat was sown in the fall by the plaintiff's brother, and by the terms of agreement he was to cut it when ready for the reaper.

Johnson had an overseer or tenant on the farm at the time, invested with the power to control the farm and the products, and from his testimony and that of Johnson's (the appellant) Clem sold out his interest in the crop for a certain mule belonging to Johnson, and in this manner divested himself of all further interest in it.

This the Clems deny, and claim that the contract was never abandoned or the interest of the brother in the wheat crop sold to Johnson or to anyone for him. When the wheat ripened Johnson had gone into the field for the purpose of cutting it, sending his cradles in advance to prepare for the reaper. While this was being done the appellee and his brother entered the field with their reaper for the purpose of cutting the wheat, claiming that the one renting the land had never surrendered the possession or the right to enter for the purpose of securing the crop. A gun was brought along by the party, the appellee being one of the number, and his brother, when told by Johnson to leave the field, declared his purpose to remain, and using such profane language as evinced a purpose to hold the possession by violence if necessary, and the appellee, according to the testimony of Johnson, sustaining his brother in his right to the possession. It is shown that all the parties knew that

the appellant had notified the brother of the appellee not to come into the field, and it is manifest that their purpose was to resist any effort by Johnson to remove them.

The right of entry on the part of Clem and his brother depended on the question as to the rescission of the contract or the sale of Clem's interest under it.

If the Clems had no longer any interest in the wheat, they were not only trespassers, but were guilty of a breach of the peace from their own testimony.

The court told the jury in the ninth instruction that if the contract had been rescinded, then the entry by Clem and those with him constituted a trespass, but that such entry, although illegal, unless forcible or violent, was not a breach of the peace, and a mere refusal to leave when requested, unless accompanied by violent demonstrations or an assault on defendant, was not a breach of the peace. In other words, that an entry without actual force, although against the will of the owner, with a purpose expressed at the time when obtaining the possession not to surrender it, is not a breach of the peace. Such is not the law. When one is in the possession of his own land and another with himself and hands enters thereon, against the will of the owner, and when requested to leave, by violent and abusive language announces his purpose to hold the possession, the entry and holding is forcible and constitutes a breach of the peace, and if M. V. Clem made such an entry on the premises of Johnson, and the appellee, his brother, was with him to aid or assist in the forcible holding of the property, he is equally guilty, and, therefore, instructions E and F, asked by the defendant, should have been given.

This is based on the theory that the contract had been rescinded, for if it had the appellant had the possession, and the appellee's own testimony makes out such a state of case as shows his guilt as well as his brother.

There are many other errors assigned, but none prejudicial to the appellant, and, therefore, will not be considered, except the alleged error in refusing the motion of the defendant to exclude the witnesses for the plaintiff from the court room in order that they might not hear the testimony of each other during the progress of the trial.

The Civil Code, section 601, provides: "That if either party requires it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses."

Under this provision of the Code, by motion properly made, all the witnesses for either party might be excluded from the court room except the witness being examined, and if this provision is to be regarded as mandatory it would produce much inconvenience in the practice and often obstruct the proper administration of justice.

The presence of the litigant himself is frequently indispensable to the attorney conducting the case, and particularly when examining witnesses introduced by the adverse party, and to exclude all the witnesses would include the litigant, if his counsel desires to examine him as a witness.

It will also occur in the practice that the presence of a witness familiar with the history of the case becomes indispensable by reason of theunavoidable absence of the litigant, and, the refore. the necessity of placing that construction on the statute that must conduce to a just and proper practice by leaving the question as to the exclusion of the witness to the exercise of a sound judicial discretion. This it seems to us is the meaning of the provision of the Code on this subject, and when it provides that where either party requires it, the judge may exclude from the court room any witness, it is a matter addressed to his discretion.

The word require means simply the right of the party to make the motion for the exclusion of the witnesses, and is not a demand that the court is compelled to comply with. The act of separating the witnesses must precede the trial, and when the motion is made the party making it should not be required to give his reasons for it, nor should the court arbitrarily overrule his motion; it must be the exercise of a judicial discretion. In this case there seems to have been some feeling by reason of the character of the litigation and the circumstances from which it originated, and we see no reason why the motion should have been overruled, but, on the contrary, it should have been sustained, nor is this in conflict with the case of Walker v. Commonwealth, 8 Bush, 86, or Salisbury v. Commonwealth, 79 Ky., 425.

For these reasons judgment of the lower court is reversed, with directions to award a new trial for proceedings consistent with this opinion.

T. M. Allen and Z. Gibbons for appellant.

Breckinridge & Shelby for appellee.

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## HEWITT, AUDITOR v. TRUSTEES FRANKFORT COMMON SCHOOL.

(Filed March 29, 1884.)

**The common school fund is not entitled to any portion of the amount realized by the State from the taxation of railroads under General Statutes, chapter 92 article 1, section 1.**

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hines.

This is a proceeding by mandamus to compel the auditor to transfer from the account of revenue for the ordinary expenses of the government to the common school fund account the sum of $271,574.17, collected from railroads from 1879 to 1883 inclusive.

It is contended for appellee that the statute provides for the raising of this revenue for the specified purpose of increasing the common school fund.

The Constitution sets aside certain funds and certain revenue, together with such sums as may be raised by taxation or otherwise, to be held sacred for the benefit of common schools. The fund here sought to be secured for the benefit of such schools is not set aside by the Constitution for that purpose, and it, therefore, should not be transferred to the common school account unless so directed by legislative enactment. Before a constitutional question can arise it must be determined that the fund was "raised" for common school purposes. This is easily determined by reference to the statutes.

Section 1 of article 1, chapter 92, title "Revenue and Taxation," General Statutes, provides for an annual tax of "forty-five cents upon each one hundred dollars of value of the real and personal estate directed to be assessed for taxation," and

that twenty cents of the amount so raised shall be "for the support of common schools."

Section 1 of article 12 of same chapter, title "Railroads, Turnpikes, Roads and other Corporations, Tax on," reads: "The several railroads in this Commonwealth, their depot grounds and improvements, with the right of way, engines, rolling stock, and other investments for the uses and purposes of the roads, are hereby assessed for taxation at the rate of $20,000 per mile, except roads known as narrow-guage roads, which shall be assessed at $10,000 per mile."

The tenth section of the same article reads: "All money paid into the treasury under this article shall be for the ordinary expenses of the government."

In obedience to a familiar rule of construction all provisions of the statute must be construed, if possible, so as to allow every part to stand and be effective. One provision does not annul or repeal another unless there is an irreconcilable conflict or an express declaration of repeal. Repeals by implication are never favored. Here we find no irreconcilable conflict and no express repeal. The first section of article 1, chapter 92, simply fixes the rate of taxation upon property in general, and provides what portion of the sum so raised shall be applied for the benefit of common schools, while the tenth article provides for the taxation of specific property and designates the application of the amount raised by the taxation of this specific property "to the general purposes of the government." But for this express appropriation of the tax thus raised to a designated purpose, it would be applied as other taxes levied upon property in general.

The several acts of the legislature passed subsequent to the General Statutes, upon which appellee relies as repealing the provisions of article 12, do nothing more than alter the amount to be assessed upon property in general as in the first section of article 1 of chapter 92, and are no more in conflict with the tenth section of article 12, chapter 92, than the first section of that chapter.

The act establishing the railroad commission does not repeal the tenth section referred to. That act does nothing more than regulate the manner of assessing and fixing the value of

railroad property. It does not direct the application of the taxes thus raised, but leaves the application to be controlled by the law previously in force.

Judgment reversed and cause remanded, with directions to dismiss the petition.

P. W. Hardin for appellant.

John L. Scott for appellee.

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## ROBION v. WAKLER.

(Filed April 5, 1884.)

**Pension money received from the U. S. is exempt from seizure for debt while it is being transmitted to the pensioner, but not after it has been actually received by him.**

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Hines.

Appellant having a judgment, execution and return of "no property," attempts to subject a house and lot occupied by appellee to the payment thereof. It is shown by the record that the property was acquired subsequent to the creation of the debt; and for defense it is alleged and proved that appellee is a housekeeper with a family, within the meaning of the statute, and that appellee purchased the property with money drawn by check on a certain bank, and that the money so deposited and drawn was on account of money received by appellee as a pensioner of the Federal government.

The questions presented are, first, whether the act of congress exempting pensions from the payment of debts follows the sum so appropriated beyond the time it reaches the hands of the pensioner; and, secondly, whether, after the fund reaches the hands of the pensioner, the Federal exemption can be extended by implication, so as to become a part of the State exemption law?

Section 4747 of the Revised Statutes of the United States reads:

"No sum of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the sum remains

with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner."

That the exemption does not extend beyond the time the money reaches the hands of the pensioner seems, from the language of the section quoted, to be beyond doubt. It speaks of money "due or to become due," and expressly protects it while in the pension office, in the hands of any officer or agent of the pension office, or "in the course of transmission to the pensioner."

The specification of the conditions under which the fund could not be subjected necessarily excludes the conclusion that the fund was intended to be protected further than specified.

A different result is announced by this court in the case of Eckert v. McKee, 9 Bush, 356, but appears not to be justified by the facts of that case as found stated in the opinion. There the money was in the hands of one to whom the check drawn by the pension agent had, by the pensioner, been endorsed, and was "in the course of transmission," within the terms and meaning of the statute. Since the delivery of the opinion in that case this court has construed the statute to protect the pension money only until it reaches the hands of the pensioner. In that case, Wayne v. Chestur, MS. opinion, June 24, 1875, the pension money had been deposited in bank, checked out and loaned, and the proceeding was to subject the money in the hands of the person to whom it was loaned to the payment of a debt owing by the pensioner. In the opinion it is said: "According to the terms of the act the protection extends no further than until the money reaches the hands of the person entitled thereto." This last utterance of the court is in accord with the decisions in other States, and has been followed by the Superior Court of this State in the case of Moxley v. Andrews, November 12, 1883, opinion by Judge Richards, 5 Ky. Law Rep., 425; Webb v. Holt, 57 Iowa, 712; Jardain v. Fairton Saving Fund Association, 44 N. J., 377; Cranz v. White, 27 Kansas, 319.

The claim of exemption on the ground that the property sought to be subjected was occupied as a homestead is not available because the property was purchased subsequent to

the creation of the debt; and, as the pensioner had reduced the pension money to possession prior to the purchase of the property, no question can arise as to whether money or property exempt from debts preserves its immunity when converted into other property which by the statute is declared exempt.

Judgment reversed and cause remanded, with directions for further proceedings consistent with this opinion.

Quigley & Quigley for appellant.

E. W. Bagby for appellee.

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## POLLEY'S EX'ORS, &c. v. POLLEY.

(Filed April 10, 1884.)

1. Advancement—Breach of warranty—Where one conveys land to some of his heirs with covenant of general warranty, and after his death a mortgage is discovered on the land, those heirs, as grantees, may recover of the estate the amount of the mortgage as a breach of the warranty, although they had paid nothing for the land and it was merely an advancement to them out of their ancestor's estate. But they can not throw the whole burden of satisfying the mortgage on the shares of the other heirs, but must themselves contribute to it.

2. Adverse possession—The mere fact that a father places his son in possession of land, intending to give him the tract, does not vest the son with any title to it, legal or equitable, nor is the possession of the son adverse to the father so as to deprive the latter of the right to mortgage or sell the land.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

James D. Polley, residing in the city of Covington, executed a will in the month of February, 1866, and died in May, 1879. At the date of his will, being indebted to various parties, he designated the property out of which his debts were to be paid, first, the proceeds of his notes; second, certain vacant lots in Covington; and, third, his lands in the county of Boone. He then proceeded to devise to three of his children, in equal parts, the vacant lots and the Boone county land after the payment of his debts, evidently supposing that much of this property would be left after the payment of his debts.

He then proceeded to devise to three of his chidren, other than the devises mentioned, certain property in the city of Covington. Before the death of the testator he had disposed of his notes, the vacant lots and the Boone county lands, leaving no personal estate to pay his debts.

The executor filed the present action for the settlement of his estate and the payment of his debts, to which all the devisees and parties in interest were made defendants. Shortly after the will was executed he sold a part of the Boone land to one Adams for near $3,500, for which he took the notes of the vendee. The testator being indebted to his daughter, Martha Ingersoll, as guardian of her infant child, in the sum of $5,722, for the purpose of securing the debt, mortgaged to her the remaining Boone county lands, and also pledged the notes on Adams as collateral security. Frances M. Polley and Joseph H. Polley, two of the devisees of the Boone county land, were in possession at the date of the mortgage of their respective interests, or the two holding jointly the land under a parol gift, as they allege, from their father. These two children died before the testator, and the latter, after their death, executed, on the 22d of January, 1868, conveyances to their children of the Boone land except the land sold Adams. This land sold Adams was taken back by the testator and sold to Lewis, and the notes of Adams, held by Mrs. Ingersoll, surrendered at the instance of her father. What became of the proceeds of the land sold to Lewis does not appear.

Mrs. Ingersoll, having been made a defendant, sought, by proper pleadings, to subject the Boone county land that had been mortgaged to her to secure the payment of the debt due her as guardian. The children of her deceased brothers resisted the sale upon several grounds: First, they allege that when the mortgage was executed on the land their ancestors were in possession under the parol gift from their father, of which fact Mrs. Ingersoll had notice; second, that the conveyance made to them by the testator, although subsequent to the mortgage, contained a clause of general warranty, and that an eviction or the enforcement of the lien depriving them of the land would give them a right of action and recovery to the extent of the loss sustained, and, this being the case, the estate left by the devisor and devised to his other children should be subjected to the debt, and being all before the court, in order to prevent further litigation, the rights of all the parties were asked to be settled, to which no exception seems to have been taken. The grandchildren making this defense are claiming under the

parol gift to their parents and the deeds made to them by their grandfather, and not under his will.

The chancellor below adjudged that the land mortgaged was not liable, and required the estate devised to assume the burden. It is evident that the testator had placed his two sons in possession of this land, intending, ultimately, to give it to them when distributing his estate, and that they entered upon the land with this understanding. This is manifest from the fact that shortly after the death of his two sons he executed the conveyance to their children for no other consideration than that of love and affection. He expresses a consideration of $2,865 for each tract, but it is evident from the recitals in each deed that this was the value of the land as fixed by the grantor in the effort on his part to make an equal distribution of his estate, and, besides, it is shown that no consideration whatever was paid by either the children or the grandchildren for the land conveyed by the two deeds.

Counsel for the appellees maintain that the parol gift investing the two sons with an equitable interest that existed before the mortgage, the subsequent conveyance by the grandfather passing to them the legal title, destroyed any equitable right the mortgagee had for the security of her debt. We do not perceive in this branch of the case any other equity existing in behalf of the two sons than the mere intention of the testator or grantor to give them this land in the final distribution of his estate. They might, having entered under this declared purpose of their ancestor, have recovered for any valuable improvements made, excluding the value of the rents; but the mere intention of the testator, evidenced by the fact of his placing his two sons in possession, or by an express declaration that he intended to give them this land, would not invest the devisees with either the legal or equitable title. The property still belonged to the donor, and his right to execute the gift was purely voluntary on his part and would not have been enforced by the chancellor against his will.

In Rucker v. Abel, 8 B. Mon., 566, it is said that such a gift is void, and it is not pretended that the parties had been in the possession such a length of time as would constitute an adverse holding vesting them with the title. The two sons were

in the possession in the same manner the devisees were, the property having been designated by the will belonging to each one of his children at the death of the testator. It is true these appellees take under the deeds and not under the will, and the creditors of the testator would ordinarily be compelled, or rather his executor and devisees, to exhaust the estate left by the testator before subjecting the land conveyed to their children. The testator owning the land in Boone, and never having parted with the title, had the right to execute the mortgage upon it, and when the grandchildren accepted the conveyance they held the land subject to the mortgage previously executed to Mrs. Ingersoll, and the land is liable to those she represents in her fiducial capacity for the mortgage debt.

As between the children and the grandchildren of the testator, some holding under the deeds and the others under the will, the question of more difficulty than any other arises.

If the testator had in his lifetime conveyed this land without having executed a prior incumbrance upon it, it would no doubt be adjudged that his estate left at his death, if sufficient, must pay his debts and not what he had previously conveyed to his children; but a different question is presented in this case.

The land conveyed was a gift to the grandchildren, and that devised was a gift to his children, no other consideration existing but that of love and affection in either instrument. There is a warranty of title in the conveyance to the grandchildren against incumbrances, etc., and, therefore, for a breach of the warranty the estate, as they maintain, is liable to them for any damages they may sustain; on the other hand, it is argued that as nothing had been paid by the grandchildren, the damages for the breach would be nominal only. The general rule is, that in an action of covenant on a warranty for the sale of land the purchase money is the measure of damages, or where there is no fraud the indemnity for the loss is the consideration paid and interest. Where there is fraud the value of the land lost is the consideration. (Lowe v. McDonald, 3 Marshall, 354; Durbin v. Garrard, 5 Monroe, 317; Davis v. Lewis, 4 Bibb, 456; Gundy v. Edwards, 7 J. J. Marshall, 367; Hill v. Godden, 16 Monore, 551.)

This court, in Hanson v. Buckner's Executors and Devisees, 4 Dana, 251, held that the consideration of love and affection

was sufficient to uphold the warranty, and permitted the recovery. While the doctrine of that case is assailed by counsel we see no reason why, in a conveyance with a clause of general warranty evidencing an advancement by the grantor to the grantee, the latter, in the event his land is lost by a superior title, should not be allowed to recover upon his warranty against the estate. It would be inequitable, to say the least of it, to permit the other children to enjoy their respective portions of the estate given to them, and one of the children deprived of his interest by a superior title, and the right to recover denied for a breach of the warranty. In devises of property, contribution is required by the statute, and in conveyances with warranty the same rule should apply, or the child losing his estate permitted to recover for the loss. The measure of damages should at least be in the nature of an equitable contribution. In the present case the objection to the judgment below is that it requires the entire loss to fall on three of the children who are holding under the will. The lien on the estate conveyed to the grandchildren was incumbered at the date of the conveyance by this mortgage debt. They come into a court of equity asking the chancellor to relieve them from the incumbrance by requiring the children who are devisees to remove the incumbrance, because of the warranty of their ancestor.

In the attempt to do this it is made to appear that some of the children were advanced by deed and the others by will, no consideration moving from any of the parties, but all indebted to the bounty of the same common ancestor for their respective portions of the estate granted and devised. When asking equity they must be required to do equity, and that is, each child must contribute to the payment of the mortgage debt in proportion to the amount received from their ancestor. If there are six children each child, including the mortgagee, receiving an equal interest, when those claiming under these deeds are attempting to make the devisor liable, those so claiming must bear an equal share of the burden with the devisees in removing the incumbrance. This does not affect the right of the mortgagee to make her money out of the land mortgaged, but as all the parties are before the court and have sought the

aid of the chancellor in settling these questions, it is proper that they should be disposed of.

The judgment below must be reversed and cause remanded for proceedings consistent with this opinion.

Collins & Fenley for appellants.

O'Hara & Bryan for appellees.

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## GOLDING v. GOLDING.

(Filed April 3, 1884.)

1. Husband and wife—Where husband induces his wife to convey to him one-half of her estate and he subsequently squanders it and deserts her, he can not upon her petition for a divorce claim one-half or any interest in the balance.

2. A gift from a wife to her husband made through a trustee is regarded as prima facie fair as against a stranger, but where the wife is assailing it equity will require proof of the exercise of free will on her part.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

In May, 1868, the appellee, then a young widow, married the appellant, a physican residing in the city of St. Louis. At the time of her marriage she was a resident of the city of Newport, in this State, but removed shortly after the marriage to the domicil of her husband. She owned at the time real and personal estate exceeding in value $100,000. The most of the property was in real estate, located in Campbell and Kenton counties and in Cincinnati, Ohio. The husband owned but little, if any, estate, but seems to have procured from his wife in a short time after the marriage a conveyance to an undivided interest in her realty for life, with the title in fee in the event his wife died without leaving children, he being the survivor.

In order to pass the title a conveyance was made to John A. Hunter of this real estate by the husband and wife, and then a reconveyance by Hunter to Golding and wife, by which the husband was invested with a joint interest for life, with the fee in him if the wife died first without issue.

The conveyance was made in the year 1869. Prior to the execution of this conveyance the wife (appellee) had executed a will, the provisions of which gave to the husband a similar interest, but having been advised she could not dispose of her

general estate in such manner, the conveyance to Hunter was resorted to so as to accomplish the intention of the parties as shown by the draftsman of each instrument. Broadhead and Hunter, who were employed as counsel, the one writing the will and the other the deeds, testify to facts from which it must be inferred, if there was an absence of other testimony, that the execution of each paper was in accordance with the wishes of the appellee, nor had they or either of them any facts before them authorizing any other conclusion.

A short time after the execution of the conveyance by which the husband was invested with title he began to waste the estate and indulge in habits of dissipation, resulting in a separation between them, and finally in a judgment for a divorce in favor of the wife restoring her to all the rights and privileges of an unmarried woman.

The present action in equity was instituted in the Campbell Circuit Court by the appellee (the wife) seeking to cancel the conveyance made to her husband, and re-invest in her the title to what was left of the real estate conveyed by the deed from Hunter.

The relief is asked upon the ground, first, that the husband fraudulently procured the execution of the deeds, and by an improper exercise of his influence over the appellee; second, that the appellant's interest in the property was obtained by him without valuable consideration by reason of the marriage, and, having obtained a divorce, she is entitled to be restored to her property by reason of the statute.

We deem it only necessary to consider the first ground relied on by counsel, as the divorce with alimony was obtained in the St. Louis Circuit Court and is now pending in the Supreme Court of Missouri, and was undisposed of at the termination of this action.

This court, in the case of Todd's Heirs v. Wickliffe, 18 B. Monroe, 866, and in Kennedy v. Tenbroeck, 9 Bush, 580, as well as in other cases, has held that a conveyance like this executed by the wife to the husband, through the intervention by a third party, is prima facie fair, and the burden is on the party assailing the conveyance to show the frauduent intent.

These cases involved controversies between the heirs at law of the wife and her surviving husband, the former attacking the conveyances for fraud and want of consideration in their execution. It is not unreasonable or unnatural that an affectionate wife without children should make the husband the object of her bounty in preference to those who would be her heirs at law if the estate had been left undisposed of, and, therefore, fraud is required to be shown before the chancellor will disturb the conveyance. Nor will this rule be departed from where the wife, during her life, assails the conveyance as having been obtained by fraud or the exercise of an improper influence by the husband over her. The chancellor, at the instance of the wife, will scrutinize closely the conduct of the husband and the motive influencing the wife to part with her estate, and when the husband, having won the affection of his wife, has such an influence over her as to make her entirely subordinate to his will, the chancellor will not undertake to adjudge that the parties are dealing at arms length and hold the wife to the contract as he would a stranger.

The husband will not be allowed to take advantage of the marital relation so as to invest himself with title to the wife's estate, and then insist upon her ability to resist his importunities as a reason for making her stand by the executed agreement investing him with title. At the time the will was executed and the conveyance made the wife was living in St. Louis, many miles distant from those interested in advising her and protecting her estate, and, at the instance of counsel employed by the husband, executed the writings by which she gave to the husband control of her estate, and vested him with such an interest as enabled him to dispose of at least one-half of her fortune. It is not to be expected that the husband or the wife would have furnished counsel preparing the deeds with the evidence of the wrongful purpose of either, and, therefore, with an honest purpose upon the part of the draftsman, these writings were prepared and signed by the wife.

The appellee was an affectionate and loving wife, and seems to have appreciated to the fullest extent the obligation of the marital relation, while the husband was a man of indomitable will, and his manner and wishes always sufficient to obtain his

wife's assent to his views. She was an unhappy woman, and her treatment by her husband, as one witness at least states, was not like that of other husbands to their wives who boarded at the same hotel. That she was compelled by his treatment of her to leave him is demonstrated by the proof, and if not by the judgment of divorce awarding her $15,000 as alimony and releasing her from the marital relation.

When separated from the husband, by reason of his treatment of her, the appellee finds him invested with title to one-half of her original estate that had been left from the wreck made of it by the execution of mortgages and in affecting loans for the support of both. Col. Taylor paid to the appellant at one time near $9,000. Nine thousand dollars was raised on mortgages upon Cincinnati property. Rents had been collected amounting to $1,800 a year. The appellant sold real estate in Newport amounting to $16,000. He sold land in Ohio amounting to $6,000. He had received and disposed of her estate to an amount exceeding $50,000, and is now insisting, regardless of the separation between them, that he is entitled under the deed from Hunter to an equal interest in the remainder, or to his rights under that conveyance, whatever they may be. The appellee at the time of her marriage was not involved in debt. Her real estate was unincumbered, and she held notes of the value of several thousand dollars.

If this was a suit in equity for partition between the parties, no marriage relation existing, what sort of an account would the commissioner report for the consideration of the chancellor? One tenant has converted to his own use a sum exceeding his entire interest in the estate and is still insisting on a partition of whatever is left in equal proportions. The only equitable settlement would be to compel the tenant to account for the estate wasted by him, and, having received his full share, the balance should be assigned to his co-tenant.

In this case the amount received by the appellant exceeds in value that which remains, and the estate left is incumbered by mortgages and liens for taxes that must be discharged by the wife. The husband obtained the conveyance without any other consideration than love and affection. Such is the purport of the deed, and there is nothing in the record showing any valu-

able consideration moving from the husband. It was his duty to support the wife, and while it was proper and equitable that her estate should contribute for that purpose, the fact that she may have enjoyed, in conjunction with the husband, the proceeds of her estate is no response to her claim for her own estate, the title to which is invested in him by reason of his influence over her, and for which he has never paid one dollar.

The love and affection prompting the execution of the conveyance should have been reciprocal, and where the husband, taking advantage of the wife's love for him and his influence over her, accepts a conveyance to her estate, and then causes her to abandon him by reason of his cruel treatment, he should in equity be required to restore that to which he acquired no title by reason of his right as husband.

The will of the wife was so subordinated to that of the husband, as the proof shows, that she made purchases of such clothing only as he selected for her, and as soon as he obtained title to her estate so as he could dispose of it for his own purposes, the alienation of all good feeling begun on the part of the husband, and the wife's affection and property were lost and wrecked by one who must have acquired both from selfish motives. It requires no statutory provision to enable the chancellor to restore the property by the cancellation of the deeds under such circumstances as surrounded the parties in this case.

By the rule of the common law the wife has no power to bind herself by contract. "Her time and labor as well as her money are the husband's property," and while this doctrine has been modified to some extent by our statute so far as the wife's earnings are concerned, to protect the wife as against the husband's creditors, the husband is entitled, by virtue of the marriage, to the personal estate of the wife and to her choses in action, when reduced to possession. As to her real estate he has no interest as against the wife, and in the present case, should the husband survive the wife, he would not be a tenant by the curtesy as there has been no issue of the marriage. He acquired the title to her real estate by the deed from Hunter, and in no other way. It is not pretended that Hunter had any other interest than that of a mere trustee for the purpose of conveying the estate back to the husband and wife, and the

husband having obtained the title without any valuable consideration, and then causing the wife to separate from him, the chancellor, in a controversy between the husband and the wife, will not require proof of actual coercion in the execution of the conveyance in order to cancel it. The controlling will on the part of the husband is shown to exist in this case, and whether exercised at the time the deed was executed is immaterial, as the character of the transaction and the sequel to its execution sufficiently establish its exercise. It was a gift from the husband to the wife, and ordinarily, as between the husband and third parties, the wife's action in giving her estate to the husband, particularly when she is without children, will be regarded as in accordance with her wishes. When the wife herself assails the gift as the result of an improper influence over her on the part of the husband, the character of the gift and the circumstances under which it was made may often be sufficient to evince improper influence on the part of the husband, although actual fraud is not established. A married woman having the power to dispose of her separate estate is laboring under no such disability as will prevent her from giving it to her husband, but at the same time, says Justice Story, "courts of equity examine every such transaction between husband and wife with an anxious watchfulness and caution and dread of undue influence, and if they are required to give sanction or effect to it they will examine the wife in court and adopt other precautions to ascertain her unbiased will and consent." (2 Story's Eq. Jur., section 1395.)

The same rule should apply in actions between husband and wife to set aside a voluntary conveyance or gift of the wife's general estate to the husband, and while the burden of proof is on the wife, the facts and circumstances antedating the deed, as well as those subsequent to its execution, will all be considered, and in this case they have satisfied the chancellor, as they have satisfied this court, that the conveyance should be cancelled.

It is attempted by the appellant to show that large sums of money had been paid by him for the wife on account of her extravagant mode of living, and that he expended greatly more than her income. This proof is in singular contrast with her economical habits before the marriage, and no such considera-

tion can properly be suggested to the chancellor as a reason for sustaining the validity of the conveyance. The appellant has disposed of all the wife's personal estate to which he became entitled by reason of the marriage, and her real estate in which he had no interest except under the deed in controversy he should be compelled to surrender. This he has been required to do by the judgment below, and the same is, therefore, affirmed.

E. W. Hawkins for appellant.

F. M. Webster, W. H. Mackoy and W. Lindsay for appellee.

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## DAVIDSON, &c. v. COOMBS, &c.

(Filed February 29, 1884.)

**1. Patents—Color of title—The statutes declaring that occupancy of land for seven years under a recorded patent from the Commonwealth vests good title in the occupant; but that a patent so far as it embraces land previously patented is void. Held—A junior patentee gains no title by holding for seven years against a senior patentee of the same land. But if he occupies for fifteen years he gets title by limitation, but only to so much of the tract as he actually occupies and encloses; (2) if, however, he enter believing himself to have good title to a notoriously well defined boundary, his actual occupancy of a part will be extended to embrace the full limit of that boundary; but it will not be so extended where he enters under a junior patent and the senior is of record. (3). Where one enters under a junior patent not declared void and occupies for fifteen years a part, claiming the whole, he is entitled to the whole provided the junior patent is embraced by the senior.**

**2. The word "null" and the word "void" mean the same thing.**

Appeal from Perry Circuit Court.

Opinion of the court by Judge Hines.

This action was brought by appellees against appellants to recover for trespass, by cutting timber, to a certain body of land claimed by appellees under a patent for twenty-five hundred acres issued in 1846 on a warrant from the Perry County Court. To this appellants answered, admitting their claim to be entirely within the twenty-five hundred acres covered by the patent of appellees, but alleging that they entered under a patent for two hundred acres issued in 1861 on a warrant from the Perry County Court, defining the boundary of their patent, alleging an adverse entry and holding for more than twenty years before the institution of the action, and that appellees

were not in possession when appellants entered. To this answer there was no reply, and as the allegations, if true, are sufficient to entitle appellants to hold the land by advesre possession of fifteen years, the answer should have been taken as true, and the jury instructed to find for appellants. This was not done, but a trial had as if the allegations of the answer had been controverted and there was a verdict and judgment for appellees. The failure of the court to instruct as indicated, and an erroneous instruction given by the court as to the seven years' statute under a junior patent, entitles appellants to a reversal, but as the case must go back for a new trial it is proper to state the law as it may become applicable to the facts as they may be then presented.

The statute law under which both of these patents were issued finds its origin in the act of February, 1835 (Acts 1834, page 360), which transfers to the several counties for road and bridge purposes all the vacant lands north and east of the Tennessee river. In the conclusion of that act it is provided that "any survey or patent made or issued under this act which interferes with any survey or patent heretofore made or issued shall be null and void."

The main provisions of the act of 1835 are carried forward into the Revised Statutes, chapter 102, and into the General Statutes, chapter 109. Subsection 8 of section 3, Revised Statutes, which was in force at the time of the survey and patent for two hundred acres, made and issued in 1861, is as follows:

"None but vacant lands shall be subject to appropriation under this chapter. Every entry, survey or patent, made or issued under this chapter, shall be void so far as it embraces lands previously entered, surveyed or patented."

This is the same as section 3, chapter 109 of the General Statutes, now in force.

The following provision of the Revised Statutes, article 2, chapter 63, and article 2, chapter 71, General Statutes, bear upon the question of limitation presented in the instructions:

"No action at law or in equity shall be brought under or by virtue of an adverse, interfering entry, survey or patent, to recover the title or possession of land from an occupant when

he, or the person under whom he claims, has a connected title thereto in law or equity, deducible of record from the Commonwealth, and has, or shall have had, an actual occupancy of the same by settlement thereon, under such title for seven years before the commencement of the action, and such possession of land shall bar and toll the right of entry into such land by any person under an adverse title or claim, and such possession as will bar the right to recover the same shall vest the title in the occupant or vendee."

This court, in McMillan's Heirs v. Hutchison, &c., 4 Bush, 616, construing the act of 1835 and the provision last quoted, held that the junior patent, to the extent of interference with the senior patent, was void. In the opinion it is said that "he," the junior patentee, "stands, therefore, in this contest, just as he would had he never procured a survey or patent; and as he has had no title derived from the Commonwealth the limitation of seven years for the protection of actual settlers under any such title does not apply to his settlement under his void patent, which conferred no right or title, and placed him in no better or more meritorious position than a settler without any documentary claim, for when he made his location he knew that he was intruding on the possession of McMillan and the survey of Watson."

The act of 1835, construed in the opinion referred to, is the same in effect as the acts quoted from the Revised Statutes and from the General Statutes. The only difference is the omission of the word "null," preceding "void," which is found in that act, but omitted in the revisions referred to. That word so omitted neither added to nor detracted from the word "void." They mean one and the same thing, and the lopping process was only in conformity to good taste. That such conclusion is in conformity to the legislative intention is manifested further by the fact that the act of 1815 declared that the title of the intruder should be "inferior" to that of the prior occupant; and as further evidence of legislative construction in conformity to this view is the fact that the words "inferior" and "null" are both omitted from the General Statutes, which were adopted long after the delivery of the opinion in the McMillan case.

From these premises and from the admitted facts it follows that the entry, survey and patent to the two hundred-acre tract is void. Neither the entry, survey nor patent confers upon appellant any right or privilege whatever; and, therefore, the court erred in giving the instruction as to the seven years' adverse holding under this patent claim.

This question being eliminated, there arises another inquiry the solution of which may be important on a retrial. To what extent of boundary is appellant entitled by reason of adverse holding? If appellee had entered upon and was in possession of the land, under the twenty-five hundred-acre patent, at the time appellant entered, that possession extended to the boundary of the patent, and appellant would be entitled to recover only such portion as he may have had actually enclosed for the statutory period of fifteen years. But if at the time appellant entered appellee was not in possession, claiming under his patent, appellant will be entitled to recover to the extent of a defined boundary when it is made to appear that appellant's occupancy is actual, visible, notorious, distinct and hostile, and extends uninterruptedly over the statutory limit of fifteen years.

When there is an entry under a claim of right, whether legal or equitable, oral or written, and the person so entering in good faith believes that he has title to a notoriously defined boundary, his actual occupancy may be extended by implication to the limit of that boundary, and title vested in the occupant to that extent after the expiration of the fifteen years' imitation. This is what is ordinarily denominated "holding under color of title." But in order that a claimant be entitled to a presumptive occupancy to the extent of the claimed boundary, he must enter and occupy under the belief that his title is good. Here such presumption can not be entertained in behalf of appellant. The source of title of both appellant and appellee is the same. The county court records of necessity show both entries and surveys, and the patent office shows both patents. Under the law requiring the order of the county court for the location, the survey, the entry and patent, it must be presumed that appellant knew that the patent obtained by him was within the patent boundary of appellee.

Knowing this he is not permitted to shelter himself under the "color of title," and thus by implication extend the boundary of his occupancy to the limit of his claim.

A junior patent not declared void by the statute gives a colorable title that may entitle the patentee, after fifteen years' adverse occupancy of a part of the patent boundary, claiming to the extent of the patent, to the whole; but in such case the occupancy and claim of the junior patentee must be within the boundary of the older patent. (Washburn on Real Property, volume 3, chapter 2, section 7; Webbs v. Hynes, 9 B. Monroe, 388; Franklin Academy v. Hall, 16 B. Monroe, 473; Bell v. Longworth, 6 Ind., 277.)

Judgment reversed and cause remanded for further proceedings.

G. W. French and B. F. French for appellants.

John L. Scott for appellees.

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## BUCKNER v. GORDON.

(Filed April 12, 1884.)

**Constitutional law—Qualifications of voters—The Constitution confers on the legislature the power of creating and controlling all municipal corporations; (2) an act requiring voters at municipal elections to prepay their taxes as a condition precedent to the right to vote is constitutional; (3) the judge of a police court is a municipal officer.**

Appeal from Clark Circuit Court.

Opinion of the court by Judge Hines.

This is a proceeding to test the right of contending claimants to the office of police judge in the town of Winchester.

In 1840 the charter of the town was amended so as to provide that the trustees should be elected "by the free white male inhabitants * * over the age of twenty-one years, who shall have been bona fide residents of said town at least six months before said election, and shall have paid their poll tax for the preceding year (whether the same hath been charged by the assessor or not), and also have paid all arrearages and taxes due by them to said town."

On the 14th of February, 1858, the legislature passed an act, entitled "An act to establish a police court in the town of Win-

chester." It enacted that the court "should be called the police court of Winchester," that the "judge and marshal shall be elected by the qualified voters residing within the corporate limits of said town," and that the "election shall be duly advertised, and conducted in the manner prescribed by law for the election of trustees of said town."

At an election held according to law appellant received the greater number of votes, excluding those who had not paid their taxes; and appellee received the greater number of votes not excluding those who had not paid their taxes.

The questions presented are: First, did the act of 1858 apply to voters the qualifications prescribed by the amended charter of 1840, or the qualification of voters in elections generally which is prescribed by section 8 of article 2 of the Constitution, which is as follows:

"Every free white male citizen, of the age of twenty-one years, who has resided in the State two years, or in the county, town or city in which he offers to vote one year next preceding the election, shall be a voter; but such voter shall have been for sixty days next preceding the election a resident of the precinct in which he offers to vote, and he shall vote in said precinct, and not elsewhere."

Second. If the act of 1858 applies the qualifications prescribed in the amended charter of 1840, is that act constitutional?

Upon the first point the inquiry is as to the meaning of the legislature in the use of the term "qualified voters," used in the first section of the act of 1858. The title of the act is to "establish a police court in the town of Winchester," and in the body of the act the "qualified voters" who are to select the presiding officer of the court thereby created are required to reside within the corporate limits of the town. At the time of the passage of the act there were but two bodies of electors to which the legislature could have referred; one whose qualifications were prescribed by the act of 1840, who were authorized to vote for trustees of the town, and the other, those who were qualified by the Constitution to vote in general State elections. There was no general statute law applicable to voters at municipal elections and for municipal officers to which reference could

have been had by this enactment. The qualifications for electors fixed in the several charters of the towns and cities of the State are and were so variant that no general rule as to qualifications can be evolved. The attention of the legislature at the time of the passage of the act was directed to the amendment, in effect, of the charter of the town which contained a description of those who were entitled to vote in such town elections as the charter provided for, and as the act fixes the boundary of the town as the limit of the voting territory, and directs that the election of the police judge shall be "conducted in the manner prescribed by law for the election of trustees of said town," both elections to be held at the same time, it must be presumed that attention was directly drawn to the qualifications for electors fixed in the amended charter of 1840, and that if a different qualification had been intended it would have been so expressed. Any other construction would be the creation of two distinct bodies of electors voting at the same time, within the same limits and upon municipal questions; one body having the qualifications fixed in the act of 1840, and the other the qualifications prescribed for electors at general elections. If such had been the intention its expression would certainly have been explicit. Especially is that true in view of the fact that long prior to and ever since the adoption of the Constitution it has been the legislative rule, rather than the exception, to fix in the charters of towns and cities a qualification for electors different from that prescribed in the Constitution for State, county and district electors.

We think it clear that the act of 1858 was intended to adopt the electoral qualification found in the amended charter of 1840.

Secondly, it remains to enquire whether the act of 1858 is unconstitutional because it fixes a qualification for electors other than that embodied in the Constitution.

Section 8 of article 2 of the Constitution, already quoted, and section 6 of article 6 appear to be the only provisions that bear directly upon this question. Section 6, article 6, is as follows:

"Officers of towns and cities shall be elected for such terms and in such manner and with such qualifications as may be prescribed by law."

Section 8 of article 2 is the only part of the Constitution fixing the qualification of voters, and that does not undertake to designate in what elections or for what office the vote may be cast. The qualification is a "free white male citizen of the age of twenty-one years," who shall have resided in the State two years, or in the county, town or city in which he offers to vote one year, and he shall have been sixty days a resident in the precinct in which he offers to vote. It prescribes the qualification of color, age and length of residence that will entitle one to vote without reference to the character of election at which the right may be exercised. But the provisions of the Constitution as to the election of State officers by the "qualified voters" of the State at large, and of judges (appellate, circuit and county), sheriffs, county and circuit clerks, assessors, coroners and justices of the peace, by the "qualified voters" of the several districts and counties, clearly indicate that this qualification for electors was intended to apply in the election of constitutional officers, as distinguished from those created by legislative act. For in addition to the officers named in the Constitution the tenth section of article 6 provides that "the general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district, ministerial and executive officers as shall from time to time be necessary and proper."

These provisions of the Constitution present a complete corps of officers for the administration of the State government, executive, legislative, judicial and ministerial, designated in the Constitution and provided for by legislative action; but no provision is made for officers for and the government of municipalities except in section 6 of article 6, which provides that such officers shall be elected in such manner, for such time, and with such qualifications as the legislature may prescribe. This failure to make specific provision in the Constitution for city and town governments, the fact that such governments were at the time of the adoption of the Constitution and have ever since been controlled by the legislature, taken in connection with the sixth section of article 6, clearly shows the intention of the framers of the Constitution to leave all these matters to the legislative will. Otherwise the sixth section, sixth article would have no operation, for if the eighth section of article 2 has reference to towns and cities, as well as

to the election of State governmental officers, the sixth section of article 6 is surplusage—there being no space for its occupancy. Towns and cities, with all their machinery or government, are the creatures of legislative will, as has been repeatedly held by the court. The power to create carries with it the power to destroy, and the power to destroy necessarily implies the power to regulate. This court has repeatedly construed the sixth section of article 6 to mean that the officers therein mentioned should be elected and not appointed, but it has also held that such election need not be by the whole body of the "qualified voters," but that it might be by a limited number. In the case of Police Commissioner v. City of Louisville, 3 Bush, 599, it was held that a selection and appointment by the police commissioners of the city of a police force was an election within the meaning of section 6, article 6; and in City of Paducah v. Cully, &c., 9 Bush, 325, it was held, construing the same section and article, that the city council might elect the city treasurer. These cases are in themselves sufficient to determine the construction of this section, for if the word "elected" in that section has reference to the qualification of electors found in the eighth section of article 2, then the whole body of those qualified to vote under that section and found within the city limits would have been required to make the election valid. It can not be said that the legislature can limit the number of those who vote for city officers, and yet may not regulate or prescribe the qualifications of those who do vote. The selection of a limited body by legislative action to elect is the fixing of the qualifications of the electors.

This conclusion is inevitable unless police judges do not come under the term "officers of cities and towns" as used in the sixth section, article 6. Such courts as police courts, with jurisdiction for the enforcement of ordinance and limited jurisdiction in civil and penal cases, are recognized by some name under the entire American system of municipal government, and have always been so recognized in this State. If such courts are city or town courts the judge presiding is necessarily a city or town officer within the meaning of the section. Nor does it matter that the power to create such courts is found in the first section of article 4 of the Constitution, which authorizes the creation of inferior courts, nor does it make the judge thereof a State judicial officer, nor does that section in any

way undertake to regulate the manner of electing the judge of such courts. Any officer who is charged with duties pertaining to the city or town government, as distinguished from a State, county or district officer, is an officer of the city or town within the meaning of the sixth section.

The cases cited by counsel for appellee to establish the fact that judges of such courts are not city or town officers are not in point. The case of Brown v. McConnell, 36 Conn., 483, decide only that an act authorizing the mayor to appoint such judge is unconstitutional, because the fifth article of the Constitution expressly provides that such appointments shall be made by the general assembly. So in the case of Commonwealth v. Conynegham, 3 Brewster, 214, it was held that as the judge presides over a court of record and of general jurisdiction he could not be appointed by an act of the legislature, because the Constitution expressly provided that such judges should be elected.

Judgment reversed and cause remanded, with further directions consistent with this opinion.

R. W. Woolley, W. C. P. Breckinridge and T. S. Tucker for appellant.

W. M. Beckner and C. & T. M. Eginton for appellee.

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## MORRIS, &c. v. MURRAY, &c.

(Filed March 8, 1884.)

**Mortgage—Description of the debt—It is not necessary to state in a mortgage the exact amount of the debt, but the description of it must be full enough to direct attention to correct sources of information so as to enable creditors and purchasers to ascertain the amount by reasonable diligence.**

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

September, 1874, B. H. Blanton and Harrison Blanton gave their note to appellee for $4,000, and to secure the payment of it the latter executed to him, at the same time, a mortgage upon 100 acres of land.

Appellee brought this action to recover personal judgment on the note, and to enforce his lien on the land to satisfy it. And appellants, children and grandchildren of Harrison Blan-

ton and of his wife, Betsy Blanton, deceased, having upon their own motion been made parties, filed an answer and cross petition, asserting a prior mortgage lien on the same land for the payment of a debt for $8,166.42, and interest from 1846, which they allege one E. A. Dudley transferred to them as heirs of Betsy Blanton.

From the statements of the answer, and exhibits filed and made parts of it, the following facts appear:

In March, 1846, Harrison Blanton executed to Jeptha Dudley and others a mortgage upon the farm where he then resided, and the tracts adjoining and connected with it, including the land mortgaged to appellee in 1874, and also other detached tracts and lots and personal property, for the purpose of securing debts he owed the other mortgagees that seem to have been long since paid or canceled otherwise; and also a debt he owed Dudley, which, as stated in the mortgage, then amounted to $16,166.42, subject to a deduction for whatever might be due Blanton for brick and other work, etc., the amount of which was not then ascertained.

In 1863 Harrison Blanton and E. A. Dudley, the only child and heir at law of Jeptha Dudley, then deceased, entered into a written contract, acknowledged by them and recorded, in which, after reciting that Blanton was indebted to Jeptha Dudley divers sums growing out of various transactions, part of which indebtedness was secured by mortgage, and that at the time it was executed part of the farm was under execution and afterwards purchased by Dudley and deeds made to him therefor and for other lots, they agreed as follows: That all the former conveyances, mortgages and other securities held by Jeptha Dudley be reaffirmed; that Blanton should pay E. A. Dudley $5,090.21 within five years from that date, and the interest thereon at the end of each year; that if Blanton complied with these stipulations Dudley was to reconvey to him all the property for which Jeptha Dudley held conveyances and mortgages, and the entire indebtedness of Blanton to E. A. Dudley, as an heir as well as representative of Jeptha Dudley, was to be thereby discharged and satisfied. But on failure of Blanton to pay the principal, or any installment of interest, at the time specified, Dudley was to be no longer bound to take

the above-mentioned sum in full satisfaction of his indebtedness, but might, if he thought proper, fall back upon the original conveyances and mortgages and regard the payments, if any, which might be made by Blanton as payments on the indebtedness as it stood before the contract. And upon the final payment of the $5,090.21, as specified, Dudley was to relinquish in favor of the heirs of Betsy Blanton the overplus of his claim above that sum and interest, with the security which he had upon the farm on which Blanton then resided, for the payment thereof.

In 1869 they entered into another contract, also acknowledged and recorded, in which it was agreed that Blanton, having failed to make all the payments of the sum mentioned within the time specified in the contract of 1863, Dudley was thereby released from the obligation to relinquish the overplus of his claim in favor of the heirs of Betsy Blanton. But Blanton, having since finished paying the sum of $5,090.21 with interest, Dudley then and thereby relinquished, released and conveyed to him, during his life, all the lands and estate contemplated and mentioned in the contract of 1863, except certain lots which were released absolutely, and also relinquished in favor of the heirs of Mrs. Blanton said overplus of debt claimed by him with all the security or securities which he held for its payment, not, however, to be enforced during the life of Harrison Blanton. But Dudley was not to be responsible for the relinquishment, and was to be indemnified against any claim of the heirs on that account.

A demurrer having been sustained to the answer and cross petition, and judgment rendered for the sale of the 100 acres of land to satisfy the debt due appellee, the heirs of Mrs. Blanton prosecuted an appeal to this court and the judgment was reversed, it being held in the opinion rendered that the facts stated by them showed a prima facie right in appellants, and that the lower court erred in sustaining the demurrer to their pleading.

Upon a return of the cause the present appellee, Murray, filed his answer, in which he denied that there existed any overplus of the debt for the payment of which the mortgage of 1846 was executed to Jeptha Dudley beyond the $5,090.21 paid by Harrison Blanton between 1863 and 1869, and also denied he had any notice, actual or constructive, of the attempted transfer by E. A. Dudley to appellants.

This action having been submitted upon the pleadings and proof, the lower court again rendered judgment for the sale of the 100 acres of land to satisfy Murray's debt, and dismissed the answer and cross petition, and the case is now here upon appeals from that judgment.

The parties to the mortgage of 1846 not only then left undetermined the amount which Blanton was entitled as a credit on the mortgage debt of $16,166.42, but, so far as this record shows, it continued unsettled and undetermined during the life of Jeptha Dudley. Nor was the amount determined, or even estimated, and stated in the contract of 1863. It is recited in that contract that Blanton was indebted to Jeptha Dudley in divers sums of money growing out of various transactions, part of which indebtedness is secured by a mortgage on his farm and other property. But it is not stated what the nature of these transactions was, or the amount involved, nor is there in the record any account, memorandum or other written evidence showing, or conducing to show, what was the overplus or balance due by Blanton to the estate of Jeptha Dudley at the date of the contract of 1863. Besides, if there existed data sufficient to arrive at the proximate amount of such overplus it would still be uncertain how much of it was secured by the mortgage of 1846, and how much not, for it is recited in the contract of 1863 that only part of the indebtedness of Blanton to Jeptha Dudley was secured by mortgage.

E. A. Dudley and Harrison Blanton are the only two witnesses who testify in regard to that indebtedness.

The former does not state anything on the subject as within his personal knowledge. The latter is biased by both his feelings and interest. For if the 100 acres of land be made subject to appellee's debt the estate of his children and grandchildren, as well as his own life estate in the farm, will be lessened to that extent. Moreover, he is confronted by his own act in executing the mortgage of 1874, which was fraudulent if his statement as a witness that such overplus exists be true. In his deposition he says that the credit to which he was entitled in 1846 was stated to be about $8,000, but does not recollect how he got the amount, but says it corresponds with J. Dudley's views of his indebtedness and with E. A. Dudley's views. He further says that at the time of the contract of

1863 he did not know how much he owed the estate of Jeptha Dudley, but that no part of the mortgage debt was paid during his lifetime, or previous to 1863, and no settlement took place between them to ascertain the amount; that he and E. A. Dudley did not agree upon any given sum as due in 1863, but they were satisfied it was about $11,000, and the object of the witness was to pay about half.

These statements are not inconsistent of themselves or with the contract of 1863. If it is true that at the date of the mortgage of 1846 he was entitled to a credit of only about $8,000, and paid nothing to Jeptha Dudley or E. A. Dudley afterwards, it can not be that the true balance in 1863 was only about $11,000. Nor can the precision with which the amount he then agreed to pay was fixed on be reconciled with his statements as a witness, that he did not then know how much he owed, and that he and E. A. Dudley did not agree upon any given sum as due. A promise to pay a sum certain, indicated not in round numbers, but by dollars and cents, as $5,090.21, implies a settlement arrived at by calculation, and amounts to more than a mere estimate made without data. It is, therefore, not an unreasonable conclusion that they did in 1863 ascertain and determine the amount then due with the same certainty that they fixed upon the amount Blanton then agreed to pay, and the amount of the overplus was not stated in the contract for the reason it did not exist.

It is true that the witness, after making the statements mentioned, furnished a written statement made out during an adjournment of the deposition taking, showing the balance or overplus due appellants to be $12,442.

But in that statement he fixes the credit he was entitled to in 1846 at $10,000, instead of $8,000, as previously stated by him, or $8,100, as stated by appellants in their pleading, and in contradiction of the acknowledgment by E. A. Dudley himself in the paper of 1869 of full payment, he credits himself by only a partial payment of the $5,090.21.

Appellants were not parties to either the contract of 1863 or the one of 1869; paid no consideration for the transfer by Dudley to them; do not appear from the record to have ever ac-

cepted, nor until this action was commenced to have ever set up claim to this gift, which is munificent, if real. On the contrary B. H. Blanton, one of the heirs, testified as a witness that at the time he and Harrison Blanton borrowed the money from appellee and the mortgage of 1874 was executed he conscientiously believed the land mortgaged was free from incumbrance.

At that time the original debt of Harrison Blanton had existed about twenty-eight years, during more than fifteen years of which period Jeptha Dudley resided near to Blanton, thus raising a presumption of payment not, in our opinion, rebutted by the facts and circumstances of this case. For whether any balance of the debt is now due, and if so how much, is not shown by any written evidence whatever; was not fixed by Jeptha Dudley during his life or stated in the contracts of 1863 or 1869, and if now established at all it must be done by the sole testimony of an interested witness eighty-six years old, whose evidence involves want of good faith on his part in borrowing the money from appellee and executing the mortgage to secure it.

"Literal exactness in describing in a mortgage the indebtedness is not required. It is sufficient if the description be correct so far as it goes and full enough to direct attention to the sources of correct and full information in regard to it" (Jones on Mortgages, section 70). "It is generally held to be sufficient if it appear that a debt is secured and that the amount of it may be ascertained by reference to other instruments, or by inquiry otherwise." (Ibid, section 344.)

By section 24, article 1, chapter 43, General Statutes, it is provided that a vendor of real estate who conveys the title before the purchase money is paid shall not have a lien for the same against bona fide creditors and purchasers unless it is stated in the deed what part of the consideration remains unpaid. While this provision has not been made to extend to mortgages, and the rule may not be strictly applied to them, still there is no reason why the description of the debt should not be full enough as to the amount intended to be secured by a mortgage to enable creditors and purchasers, by reasonable diligence, to discover it.

Conceding the contracts of 1868 and 1869 to be recordable instruments and constructive notice of appellant's claim, yet appellee could not by the most diligent inquiry have ascertained the amount of overplus claimed by them or even the approximate amount, the only source of information being Harrison Blanton, who had by his conduct declared no such surplus existed.

Considering the staleness of appellant's claim, the circumstances under which it was attempted to be transferred to them, and the absence of reliable evidence to show the amount of it or that it exists or any amount, we are of the opinion it should not avail them against appellee, who in good faith, and without such notice as the law contemplates, loaned his money and took a mortgage on the 100 acres of land for its security.

The judgment must be affirmed.

John and J. W. Rodman, A. J. James and W. P. D. Bush for appellants.

W. Lindsay, D. W. Lindsey and A. Duvall for appellees.

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## BRANSOM'S ADM'R v. LABROT & GRAHAM.

(Filed March 18, 1884.)

**Negligence—Land owners—Pleading—Appellee owning an unfenced lot opening on a public street on which lot children had been accustomed for years to play, piled up thereon a number of heavy timber so carelessly that one of them fell on appellant's child and killed him instantly. Held—Appellees are liable for willful negligence under the statute. (2.) Petition in such cases must allege willful neglect. But the fact that the term gross is coupled with willful does not signify a less degree of negligence. (3.) The owner is entitled to the exclusive use of his land, but subject to restraints imposed for the welfare of others. (4.) The owner is not obliged to keep land in a safe condition for the benefit of trespassers, but must have reasonable care for them and not wantonly expose them to injury. (5.) Higher degree of care must be used towards a child than towards an adult.**

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellant, Bud Bransom, administrator of his infant son, Burtie Bransom, deceased, brought under section 3, chapter 57, General Statutes, which is as follows:

"If the life of any person * * is lost or destroyed by the willful neglect of another person or persons, * * their agents or

servants, * * then the widow, heir or personal representatives of the deceased shall have the right to sue such person or persons, * * and recover punitive damages for the loss or destruction of the life aforesaid."

The question on this appeal is whether the facts stated in the petition and amended petition, to which a general demurrer was sustained, constitute a cause of action.

The statement in the pleadings is substantially as follows: Appellees, Labrot & Graham, are partners in business, and as such the owners of about 200 pieces of oak and poplar timber, each eight feet long, from one to eight inches square and weighing from 100 to 200 pounds, which they employed and caused appellee Shaefer, their agent and servant, to pile up on a certain uninclosed and unprotected lot of land owned by Harvie in the city of Frankfort; that instead of stacking the timber upon level ground, and placing the pieces so as to make the entire pile safe and secure, as they should, and by ordinary care and diligence could have done, they were, by the gross and willful neglect of appellees, placed promiscuously in one large, irregular and dangerous pile, six or seven feet high, on a small cone-shaped hillock so narrow that it was impossible for the pieces nearest the ground to safely support those above them, and the top pieces being thus left without secure foundation leaned at irregular angles and were suspended in a dangerous condition, ready to fall at any time of their own weight; that for a period of more than fifteen years next before the life of deceased was destroyed the public had been licensed and permitted by the owner to enter upon, use and enjoy at will the lot and passway across it from Clinton to Wilkinson street as a common thoroughfare, upon which passway and not exceeding forty feet from Wilkinson street the pile of lumber was placed, causing an obstruction thereto.

It is further stated that deceased was, when he was killed, residing with his father within less than 200 feet of the lot, and for many years a large number of small children living near thereto were in the habit of resorting to and playing and amusing themselves both day and night on the lot, and around and near the timber after it was placed there, all which was well known to appellees before and at the time. And after it

was so placed a person residing near the lot gave notice to them of the dangerous character of the lumber pile and requested them to make it safe, which, with ordinary diligence, they could have done. But they failed and refused to do so and permitted it to remain in the same condition until May 12, 1881, when, without the fault of appellant or power to prevent it or fault on the part of deceased, one of the heavy timbers fell upon his head and body and crushed his brains out, instantly destroying his life.

To maintain an action under the section quoted it is necessary to allege that the loss or destruction of life was caused by the willful neglect of the party sued. But we do not agree with counsel for appellee that because the term "gross," which signifies a less degree of negligence, is unnecessarily coupled throughout the petition and amended petition with "willful," which signifies the degree contemplated in the section, the force or meaning of the latter is qualified or rendered doubtful.

It does not appear whether Labrot & Graham were in the lawful possession of the lot or not; but as it may, from the statements in the pleadings, be fairly inferred, we will consider this case as if they were.

As a general rule the owner of land may retain to himself the sole and exclusive use and occupation of it. But as property in lands depends upon municipal law for its recognition and protection the individual use and enjoyment of it are subject to conditions and restraints imposed for the public good, and from a reasonable and humane regard for the welfare and rights of others. Hence, according to the maxim sic utere ut tuo alienum non laedas, a party may be made liable for the negligent use of his property whereby the person or property of another is injured.

It is held that a party is guilty of negligence in leaving anything in a place where he knows it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person (1 Addison on Torts, 511). And, said a learned judge: "It appears to us that a man who leaves in a public place, along which persons and amongst them children have to pass, a dangerous machine, which may be fatal to anyone who touches it, without any precaution against mis-

chief, is not only guilty of negligence, but of negligence of a very responsible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." (39 Q. B. Div., 339.)

Counsel for appellees refers us to the following rule laid down in the case of Hargraves v. Deacon, 25 Mich., 1: "The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licenses or others who may come upon them, not by invitation, express or implied, but for pleasure or to gratify their curiosity, however innocent or laudable their purpose may be."

If this rule is to be interpreted so as to relieve the owner of private grounds from all or even reasonable care for the safety of those who, without his invitation, may come upon them, it is not a reasonable or humane rule, for the owner has no right to wantonly injure even an actual trespasser. It, however, has no application to this case, for the lot upon which the lumber pile was placed had been for many years, by license of the owner, used as a passway by the public and a playground by children, and even if appellees were lawfully in possession of the entire lot, still the transfer of that possession by the owner to him did not necessarily operate as a revocation of the license, or make those going on it without notice of such revocation even technical trespassers, especially as the lot continued uninclosed.

But the rights and duties of appellees in this case are to be considered and determined in their relation to an infant, who, though his exact age is not given, is stated in the pleadings to have had, by reason of his tender years, no knowledge of the impending danger from the timber pile or power to prevent the destruction thereby of his life.

It is a reasonable and necessary rule that a higher degree of care should be exercised towards a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity. Hence conduct which towards the general public might be up to the standard of due care, may be gross or willful negligence when considered in reference to children of tender age and immature experience.

While, therefore, the owner of land is not bound to provide against remote and improbable injuries to children trespassing thereon, there is a class of cases which hold owners liable for injuries to children, although trespassing at the time, when from the peculiar nature and open and exposed position of the dangerous defect or agent the owner should reasonably anticipate such an injury to flow therefrom as actually happened. In such case the question of negligence is for the jury. (1 Thompson on Negligence, 304-5, and numerous authorities cited.)

"It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instinct, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine so that his neighbor's child, attracted to it and tempted to intermeddle by instincts equally as strong, might thereby be killed or maimed for life. Such is not the law." (9 East., 277.)

The proprietor of a paper mill propelled by steam, in a sparsely settled portion of a city, left two cog wheels geared together outside the wall, twenty inches from the ground and twenty feet from the street, exposed, unprotected and constantly in motion. A boy three years of age playing near this gearing was caught in it and his leg taken off. In that case suit was brought after the party injured arrived at full age and the jury found for the defendant. But the Supreme Court reversed the judgment on the ground the verdict was against the evidence. (1 Head, 610.)

The owner of a coal yard had an elevator worked by steam close to the sidewalk. During an intermission of work the sliding door by which it was commonly shut off from the street was left open and unguarded, in consequence of which a child got under it and was crushed by the descending car. The question in that case was held to be for the jury. (Mullaney v. Spence, 15 Abb. Pr., N. S., 319.)

In the case of Railroad Company v. Stout, 17 Wall., 457, it was held that the care and caution required of a child is according to its maturity and capacity only, to be determined

in each case by the circumstances of that case, and that a railroad company might be held liable on the ground of negligence for a personal injury to a child of tender years in a town or city, caused by a turntable built by the company upon its uninclosed land, left unguarded and untouched in a situation which rendered it likely to cause injury to children. To the same effect are the cases of Keffe v. Milwaukee R. Co., 21 Min., 207, and Koons v. St. Louis R. Co., 65 Mo., 592; Whirley v. Whitman, 1 Head, 610.

The case of Louisville & Portland Canal Co. v. Murphy, 9 Bush, 522, is not inconsistent with the general doctrine now made applicable to this case. There a small child attempting to follow her sister, only two years older than herself, who had been sent to a grocery store on the opposite side of the canal from where they lived, fell through the iron railing of the bridge and was drowned. The bridge was safe and sound for all ordinary purposes of travel, and was originally built as a matter of private convenience to the company. It was not a proper or usual place of resort for children, because it was more or less dangerous to them, whether sound or not. Nor did the defect in the railing render it unsafe for persons to pass over it. This court, therefore, held that "good faith did not require it should be kept in such condition as to make it a place of safety for children, and when made to answer all the purposes of travel nothing more should be demanded of the company."

In this case the lumber pile was within forty feet of a public street, across a passway the public had been accustomed to use, and upon an open, unfenced lot that children had for years been in the habit of resorting to by license of the owner and without objection or warning by appellees, and to which they could, before the timber was placed there, resort with safety. It was, therefore, the duty of appellees in placing their lumber upon the lot to do it in such manner as to make it reasonably safe and secure against injury to children coming there. And as, according to the statement in the pleadings, they failed to do so, and the lumber was piled by appellee Shaefer, as the agent and in the scope of his authority from appellees, Labrot & Graham, we think a prima facie case was presented, and the court erred in sustaining the demurrer.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

J. L. Scott for appellant.

Wm. Lindsay for appellees.

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## CITY OF LOUISVILLE v. COCHRAN, &c.

(Filed April 5, 1884.)

**Constitutional law—Taxation—An act which provides that in an action by a city to recover its taxes a particular form of petition, insufficient to show any right in the city to collect taxes, shall be sufficient; that the defendant shall be cut off from all except two defenses—that he has paid the taxes, or that the property was not taxable; that copies of notices shall be conclusive evidence that such notices were mailed with postage prepaid as required by the charter is unconstitutional. It deprives the taxpayer of his property without due process of law.**

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

This was an action in the Louisville Chancery Court to recover back taxes for the years 1876 and 1877 on the following petition: "The plaintiff, the city of Louisville, says that the defendants hereto are the owners of a certain lot of land in the city of Louisville (description is here given), the taxes assessed and levied on which lot of land by this plaintiff, in and for the years 1876 and 1877, have not, nor have any of them, been paid to this plaintiff, and the bills for which are filed herewith and made a part hereof. Wherefore, the plaintiff prays judgment for the amount of said taxes and its costs and the enforcement of the lien given by the statute, the sale of the said lot of land and for general relief."

The appellees severally demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained their demurrers, dismissed the petition and the city took this appeal.

The petition is in exact conformity with the form of petition prescribed by section 6 of an act of the legislature to amend the charter of the city of Louisville, approved March 29, 1882. The parts of that section essential to the discussion of the grave questions raised by the assignments of error and argument in this case are as follows:

"The tax bills, directed by section 5 hereof to be made out by the assessor of said city, shall be by him listed for collection by the back tax collector of said city, who, if such bills be not promptly paid, shall cause actions to be instituted thereon in the Louisville Chancery Court to coerce the payment thereof, and cause such actions to be prosecuted to a final judgment according to the rules and practice of said court, except that the petition in all such cases shall be as follows:"

Here follows the form of petition adopted in this suit. The section then provides: "No defense shall be allowed to any action instituted under the authority of this section except that the lands, improvements or personal property assessed for such taxes were not liable to be assessed on or as of the dates at which so assessed or re-assessed, or that the taxes sued for have been paid in whole or in part, * * * * and in all and every action instituted by the city of Louisville to recover payment of taxes the affirmative allegations of the answer shall be treated and held as controverted." By section 8, at its close, it is provided that "the tax bills shall be evidence of every fact necessary to entitle the said city to recover * * * in any action for the recovery of taxes."

The tax bills directed by the fifth section to be made out by the assessor are to embrace taxes defectively levied and assessed for the years 1876, 1877, 1878, 1879, 1880 and 1881, and to be issued upon an assessment of omitted property and a re-assessment of property defectively assessed for each or either of the years named.

The supposed facts contained in the recital of the fifth section are said to have been the moving cause of this extraordinary enactment, and their recital, although not conclusive or presumptive evidence of their truth as to strangers to the act, furnish, in some degree, evidence of the good intent of the legislature in passing it. That recital is as follows:

"Whereas defects existed in the assessment and levy of taxes by said city in each of the years 1876, 1877, 1878. 1879, 1880 and 1881; and whereas, a large proportion of the persons owning lands or improvements on which taxes were levied in each of said years have paid such taxes in full; and whereas, others owning lands or improvements in said city and on which taxes

were levied by said city in each of said years have failed to pay such taxes or have paid them for only some of said years; and whereas, there were lands or improvements in said city liable to be, but which were omitted to be, in said years, or in some of them, assessed for taxation by said city; and whereas, it was at all times doubtful whether the payment of such unpaid taxes could have been legally coerced or such omitted property legally assessed; now that the principle of an equal and just taxation may be preserved, it is made the duty of the assessor" to assess and re-assess the property and improvements omitted or on which taxes have not been paid for any or all of the years named. These extracts from the act show that the property and improvements sought by it to be subjected to taxes were from some illegality in the levy or assessment for those years, either beyond the lawful power of ministerial officers or protected by the law of the land, as administered by courts of justice from coercive sale, either under judicial decree or by ministerial officials. What that illegality is or was can not be obtained by an inspection of the act, but whatever it may be, there are rules, based upon constitutional protection to property, which define the curative power of the legislature and fix limits to retrospective laws. The law limiting legislative power on this subject falls between what are termed mere irregularities in legal proceedings arising from defects in them which may be cured by legislative enactment unless expressly forbidden; and those defects which relate to the substance of right or jurisdiction and which can not be cured without cutting off defenses based upon irrevocable facts out of which the right grows, or divesting vested rights in property or destroying the remedy for its protection which gives value to it, or enacting unequal and partial legislation or adopting some of the other innumerable modes of invading the rights of life, liberty and property which the legislature might resort to or mistakenly assume, were it permitted to pass the bounds of its constitutional power to legislate and usurp judicial functions committed to another and a co-ordinate department of the government (Section 2, article 1, Cons. of Ky). The general rule, says Cooley Con. Lim., 371, speaking of statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon, is: "If the thing wanting, or which

failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

This general view of the question, whose converse is equally true, shows the doctrine more concretely stated above to be sound law; but what matters are essential or nonessential to binding legislative proceedings depend upon rights which existed before we had a Constitution, and rights which have been created by the Constitution through its expressions, inhibitions and limitations. We shall look into these great matters. The 29th chapter of Magna Charta granted that "no freeman shall be taken or imprisoned or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right." This is fundamental law in a monarchy where even class distinctions exist, and certainly it is fundamental in a government of equal rights, equal laws, and equal remedies. Its spirit and essence are embodied in the 5th and 14th amendments to the Constitution U. S., by which it is declared that no person shall be deprived of life, liberty or property "without due process of law," and embraced in the Constitution of every State in the Union and in that of Kentucky in these words: "Nor can he be deprived of his life, liberty or property unless by the judgment of his peers, or the law of the land."

It is important that we understand here what is the meaning of "due process of law" or "the law of the land."

This court said in Varden v. Mount, Hines, Judge, 78 Ky., 89: "The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property

through what is ordinarily understood to be judicial process, the general rules that govern society in reference to the rights of property." In the case of Taylor v. Porter, 4 Hill, 140, the court, commenting on them, say: "Their meaning seems to be that no member of the State shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of the common law," and not by mere legislation. And again: "The words 'due process of law' in this place can not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property."

In Westervelt v. Gregg, 12 N. Y., 209, it was said: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." That definition of the phrases in question which seems to meet Judge Cooley's approval is taken from an opinion in the case of The Bank of Columbia v. Okely, page 244, 4 Wheaton, where it is said "that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by established principles of private rights and distributive justice." These quotations furnish a correct general notion of the meaning of "the law of the land."

It is well and clearly settled that "the law of the land" in constitutional meaning refers to the common and statute law in force when the Constitution was adopted. The great question then is, not what the common and statute law were at the adoption of our Constitution, for these may be easily ascertained, but how far can the legislature proceed in changing either and not transgress the law of its own power as limited and curtailed by the Constitution of the State.

It is now generally understood by citizens, as well as courts, that the legislature has no power to interfere with title of the citizen to his property or to interrupt him in its free enjoyment, much less to transfer it against his will to another, either by express enactment or destruction of the remedies for its defense and protection. This general rule is subject to exceptions that relate to the power to exercise the right of eminent

domain, which is the right to take private property for public use upon due compensation being made; to authorize the levy, assessment and collection of taxes for public purposes; to give direction to title of property subjected for such purposes; to provide for the necessities of the State and the like, but the exercise of legislative power even over these subjects has its bounds, and must be uniform and cast an equal burden upon the citizen, and free from favoritism, special privileges and discrimination, and according to the law of the land.

There is, it is true, a vast difference as to controversies between citizen and citizen relative to their private rights, and controversies between government and its citizens about their public duties. As to the former the law of the land throws its inviolable protection around the property of the citizen through constitutional preservation of due process of law, which means that he shall be brought into court by notice or warning, and there given an opportunity to make known or assert his rights or maintain his lawful defenses, introduce his evidence, have it heard and weighed according to its truth, unrestricted by arbitrary rules that pervert its meaning, and have judgment pronounced upon his cause after a regular, fair open trial, according to the principles of private right and distributive justice as administered by the usage course and solemnities of the common law. To the latter a different rule, based upon State necessity and immemorial usage, is applicable. The laws for the levy, assessment and collection of taxes may be summary in their nature, and dispense with the careful and methodical steps of the common law in giving personal notice, making up issues by regular pleadings, having a trial by jury, judgment and execution (2 Overton, 215). The collection of taxes under such summary laws is generally and properly confided to ministerial officers. And when the power of levy and assessment are delegated notice is usually required as to the former and must be given, and an opportunity to be heard allowed as to the latter. And while this summary remedy for levying, assessing and collecting taxes has the plea of necessity and immemorial usage for its support, every dictate of natural justice and the letter and spirit of the Constitution require that the citizen shall be warned and have an opportunity to be heard

before he is condemned or his money or property taken; and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby. These permissible summary laws for execution of the taxing power presuppose, whether the levy be directly made by the legislature or the power be delegated to other authority, that the purpose of the levy is public and the taxes to be raised by it are in some reasonable or ascertainable degree a benefit to the public, and that the assessment is uniform, equal, free from fraud, and in the name of the owner or possessor of the property (42 Mo., 167). Then with these antecedent requisites existing, the ministerial officers may proceed, but they must comply strictly with the statute under which they act. And the citizen is entitled to notice and an opportunity to contest the valuation of his property, and the legislature has no power to deny to him this right. But whether the proceedings in execution of the taxing power be summary and confided to boards, assessors and ministerial officers or judicial, and invested with the forms and solemnities that signalize a court, they must be according to "the law of the land," whose prime essentials are alike applicable to all proceedings by which a citizen may be deprived of life, liberty or property. To ascertain what will satisfy "the law of the land," with reference to such summary proceedings, is a matter of great difficulty growing out of the grounds on which the rule that supports them is based, and the plausibility, if not reasonableness, of the position that they are in conflict with the letter and spirit of the Constitution. Mr. Cooley, in reference to such laws, and the exercise under them of the taxing power, says: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs" (Con. Lim., 357). The court in State v. Allen, 2 McCord, 525, with reference to the process for collecting taxes, said: "We think that any legal process which was originally founded in necessity has been consecrated by time and approved and acquiesced in

by universal consent is embraced in the alternative law of the land." And this court said, in Harris v. Wood, 6 T. B. Mon., 643: "Taxes were always recoverable, not only without a jury, but even without a judge, and the assessment of ministerial officers has been made to operate as an execution on the citizen, and the collector could distrain, and any public collector could be subjected to judgment on motion for the amount."

These authorities, and many others not necessary to cite, may be considered as settling the question that summary process usually adopted in this and other States for the enforcement of the taxing power is not contrary to the law of the land as secured to the citizen by the Constitution. But in every case and under all forms of remedy the citizen has a right, which must be preserved, to be heard before some tribunal on all questions which are essential to the constitutional protection of his property. The power to levy and collect taxes is an incident of sovereignty and it belongs to the legislative department, but the exercise of that all-prevading power, like every other governmental power, is so limited that it can not be arbitrary, and is subject to rules prescribing bounds to the purpose of the levy and regulating the manner of assessment and collection. The purpose must be public, which is usually ascertained by the benefits to flow from the collection of the tax to the public and the consideration which supports the exaction from the citizen. The "form of taxation" and the power to enforce it can not be assumed to cover a different purpose which is beyond legislative authority. Nor can a levy be so made or statutes for enforcing it so framed as to prevent an inquiry by the courts into the nature of the levy or the character and purpose of the alleged tax where such inquiry might show that either levy or tax was the result of an unconstitutional assumption or forbidden exercise of legislative power. This follows from the fact that the legislature is not possessed of uncontrollable power to declare any levy it may make or authorize to be a tax, when in fact it is not a tax, but a guise to mistaken or purposed assumption of legislative power. And when the levy is unassailable, still the statute prescribing the manner for the assessment and collection of the tax is invalid if it precludes the citizen from a hearing on

such questions as that of inequality of burden, fraud in the assessment, collusion by assessors or collectors with tax title purchasers, or upon a state of facts which existed at the passage of a curative act, that forbade the interference with them by the legislature on constitutional grounds or principles on which the inherent and highest rights of men are based and have been immemorially recognized in this government. Such statute would be unconstitutional, because it would then destroy the rights of the citizen through the indirect methods of an alleged remedy which the legislature had no power to formulate.

For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results (Vanzant v. Waddle, 2 Georgia, 270). And the manner of the exercise of an otherwise just and clear authority may be as usurpatory as an arbitrary assumption, and it is the most insidious method of unauthorized acquisition of power whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground for respectful but determined disregard.

Looking to these general views we will enquire whether the provisions of the act under consideration are permitted or sanctioned by any maxim of law or legal process known to "the law of the land" for the levy and collection of taxes.

It prescribes what facts shall constitute a cause of action for taxes by declaring a form of petition which is almost without substance, and clearly insufficient to show any legal right to collect the taxes, if essential elements which constitute that right are to be considered.

It so circumscribes the defense to this legislative petition as no inquiry can be made under the permitted issues that might show fraud, oppression or inequality in the assessment, illegal purpose of the levy, spoliation, vested rights, completed limitation, partiality of the act itself or any other valid defense which would be a bar to a recovery of this tax, whose history it closes by an alteration of the rules of evidence that violates the laws of cause and effect, sets at naught the deductions of common sense and has no place in the list of conclusive legal presumptions which are based on the common experience of mankind affected by kindred conditions.

Section 6, in prescribing the form of petition, confines it to the following elements: First, that the defendant owns the real estate and it is situated in the city; second, "the taxes assessed and levied on which" have not been paid and the tax bills for which are herewith filed; third, the prayer. The first element contains an affirmation, and as to the second the affirmative matter is nonpayment. There is no direct allegation that the taxes were assessed or levied by any authority, and for aught that appears in the petition they may never have been levied or assessed, and, if so, the levy and assessment may have been void for some of the reasons indicated in this opinion. As to the "tax bills" they may be false or fraudulent, or issued without warrant of law. How far the legislature may go in providing general modes of pleading we need not now determine, for this petition is made potent for evil and contrary to "the law of the land," by limiting the grounds of defense, and altering the effect of evidence to which is affixed an arbitrary meaning and force. The defense is confined to two grounds: First, that the property was not taxable, conceding the validity of the tax; second, the defendant had paid the amount. And in order, it must be supposed, to relieve the city from proof as well as averment, the affirmative allegations of the constituted answer are commanded to "be treated and held as controverted," a favor denied to the general body of litigants, and section 8, on the evidential branch of anticipated inquiry, declares that "the tax bills shall be evidence of every fact necessary to entitle the city to recover in any * * * action for the recovery of taxes."

Thus the illegal machinery of this act was complete for stifling inquiry into substantial and constitutional rights which may exist and which no lawful power is able to destroy by exempting the city from making allegations of facts essential to a recovery, denying the privilege to the defendant of raising any issue as to those essentials and dispensing with their proof by investing facts with a fictitious force.

One more reference to the extraordinary features of the act and we will pass to our concluding views. By section 2 it is declared that attested copies of letters, required by the charter to be written and recorded, taken from the record shall be evi-

dence that such letters were "mailed in the postoffice in said city, postage prepaid."

It is contended by counsel that the legislature meant to make, and had the right to make, the tax bills and attested copies of letters conclusive evidence of the facts as indicated in the act. And this, we think, is what the act really means for the reason that the tax bills and letters were competent, but not conclusive evidence without aid from the act on any question which might affect either or bear upon the duties connected with them.

But the legislature has no more power to give conclusive effect on a vital point to such evidence than it has to declare truth to be falsehood, or a fact to be present where none exists. In the case of Abbott v. Lindenbower, 42 Mo., 166, the court said: "There is abundant authority (and this we find on examination to be true) to the effect that the legislature may make the deed of a public officer prima facie evidence of title, but they can not make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power." And in Allen v. Armstrong, 16 Ia., 508, the court laid down the rule in this language: "We state the principle, which must be legally and logically true, in this wise: "If any given step or matter in the exercise of the power to tax (as, for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, can not be dispensed with, and, with respect to that, the owner can not be excluded from showing the truth by a mere legislative declaration to that effect." These authorities and the reason of the rule itself are sufficient to refute the claim that the legislature has power to give such evidence conclusive effect as to "every fact necessary to entitle the said city to recover," or of any fact essential to be communicated to the citizen, as notice to enable him to have a hearing about the valuation of his property or the like, unless such communication is sufficiently proven, like other facts, to have been made. What might be the result were this evidence allowed the sweeping conclusive force attempted to be imparted to it by the act? The hearing directed by the 5th section to be given the citizen on valuation only of his property could be proven though never given.

While the law requires the board to be in continuous session, it might not do its duty and this be the ground of the citizen's complaint, yet a letter informing him of the fact that the board had given him an opportunity of a hearing by being in continuous session, though never mailed or heard of by him, would close that matter. And so the production of a "tax bill" would settle every necessary fact, regardless of its truth, whether evidence of a mere curable informality or the nonexistence of the essentials which vitalize the taxing power; or of facts that prevent unequal burdens, fraudulent assessments, or which might show that the provisions of this act were in their operation contrary to "the law of the land." The act excludes investigation into those defects which are incurable as well as those that are merely formal, and were it sanctified into a respected precedent it would enable the law-making power to declare its own acts constitutional by depriving the citizen, through the process of regulating remedies, of all means of testing their validity, or questioning legislative power or the manner of its exercise. Under this act the levy may be void, the assessment unequal, vested rights divested, the property of one man listed in the name of another, the real owner deprived of notice and an opportunity to reduce an oppressive valuation, and so on; yet the doomed defendant must submit without the benefit of the law of the land, because the city need not allege, and he is not permitted to plead, any facts which would raise such questions, and were they to find their way into this new mode of forensic trial the production of the "tax bill" would conclusively settle them in favor of the plaintiff. While it is true that a legislative act, plainly within the limits of legislative power, is itself the law of the land, and the legislature is invested with power to levy or prescribe the mode of levy and provide the means of enforcing the collection of taxes, yet where summary, or as it is sometimes called administrative, process is provided, and its execution confided to ministerial officers, the courts may nevertheless hear and determine such questions as involve the existence of the power over the particular subject, or its unauthorized exercise in the manner of the levy, or by the means and method adopted for the assessment and collection of the tax. These are subjects over which

the courts can not be deprived of jurisdiction by the legislature, for the reason that they are judicial subjects confided to the courts by the Constitution, and the right to whose investigation, through their instrumentality, is secured to the citizen by "the law of the land."

Thus while summary process, based upon necessity and immemorial usage, is allowed, and its execution generally and properly confided to ministerial officers, the rights of the citizen are guarded by "the law of the land" from invasion in the name of this very summary process itself and by the unregulated assertion and the unconstitutional assumption of power.

Courts, because their powers are judicial, can not be burdened with the duties incident to collection of taxes in the ordinary course, nor can they be compelled to perform the common duties of executive and ministerial officers, but they may be empowered to hear any judicial question arising between government and citizen, and when such power is conferred by act of the legislature the remedy for its exercise must be such as will enable the court to hear the facts, ascertain their truth, and render judgment according to right, and the essential elements which constitute it. There is no power to compel the courts to decide that a petition contains a cause of action when it does not; where the act uttering such mandate forbids just and substantial defenses in advance, and alters the natural and logical effect of evidence for the purpose of curing ambiguous defects, and rendering past transactions and fixed facts actionable, when in truth, were they pointed out, they might show that they were beyond retroactive legislative power and nonactionable. If this were not so "the law of the land" does not mean what has been shown, and the courts would be crowded with tax collections, under judicial guise, where nonessentials and dispensed and dispensable conditions were disposed of by the legislative act, and nothing remained save these two questions: Was the property taxable? Has the owner paid the tax? and neither of them would be controverted in one case out of a hundred. This act can not strip the courts of their orderly methods, close inquiry into those essentials which the judicial power was created to examine and

maintain, and then exact judgment from them that carries with it the dignity of fair, open, full, solemn investigation after the customs of courts and the forms of the common law.

It is conceded that the legislature can, in its wisdom, alter, change, amend or repeal both statute and common law which prevailed at the formation of our Constitution, so long as the principles of "the law of the land" embodied in them and which are essential to the protection and maintenance of private rights and the redress and prevention of private wrongs are substantially preserved. "Administrative and remedial process may change from time to time, but only with due regard to the landmarks established for the protection of the citizen" (Cooley Con. Lim., 356). Hence the legislature can not, under its power to regulate remedies and prescribe forms of pleading, dispense with allegation of essential facts, cut off substantial defenses, and alter rules of evidence or invade in any other manner the established principles of private rights, and of that common justice which divides, assigns and deals out to each citizen his proper and equal portion thereof. And if the legislative power were not thus limited the means or remedies recognized by "the law of the land" as essential in ascertaining right and rebuking wrong would become the chief point of attack or the post of danger from unconstitutional assertion of such power. In these means and remedies are to be found the security for the most sacred rights and best privileges of the citizen. For if the forms and solemnities necessary to the orderly and intelligent determination of legal and equitable rights, according to the true meaning of "the law of the land," were stricken down in favor of one citizen against another, then, while retaining the form of that clause of our Constitution which was translated from Magna Charta as the gem of civil rights and still possessing the body of those laws, their virtue would be dead and useless for the remedy, their breath of life that enables the citizen to enjoy the benefit of their principles, would be gone. If such results as this act seeks to accomplish could be reached by the methods it prescribes "it would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle

ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country. (Webster, in Dartmouth College Case, volume 5, page 487, Works of Webster.)

The authorities and statutes enacted by sister States, which have been cited and urgently pressed by counsel for the city, go no further than to dispense with form, both as to action and defense, and they do not arbitrarily deny, in any manner or degree, the right to show any of the defenses which we have indicated are inviolable. Nor are any of those statutes blemished with anticipative precautions that wholly destroy opportunity to assert or prove such defenses. Herein they differ from the present act, which is unconstitutional so far as it prescribes the form of petition, restricts the defense and alters the rules of evidence.

Wherefore, the judgment is affirmed.

H. M. Lane for appellant.

Geo. DuRelle and R. W. Woolley for appellee.

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## RECENT LEGAL LITERATURE.

Lyrics of the Law. By J. Greenbag Croke. Sumner, Whitney & Co., San Francisco, 1884.

Some of the poems in this little volume are very amusing and some are very trivial, without being at all amusing. Among the best are those that parody well known cases. There is one on Luther v. City of Worcester, 97 Mass., 272, where the plaintiff fell and injured himself on the sidewalk, which was covered with ice at the time, and sued the town for damages. The law is thus stated:

> The court this plain distinction draw
> "When ice and snow, by natural law,
> Are slippery found before your door,
> You fall—the town's not liable.
>
> "But when by man they're trodden down
> In ridges, or an icy crown,
> You, falling then, can sue the town
> And get your heavy damages."

Desty's Federal Procedure. By Robert Desty. Sumner, Whitney & Co., San Francisco, 1884.

Five editions of this well known and most useful volume having been exhausted the sixth has just been issued. It is brought down to the present date and contains all appropriate references to the U. S. Rev. Stats., issued in 1881 and also to those issued since. We observe that the publisher promises to print future amendments to the statutes and rules in the same style as this volume, and furnish them to all purchasers who send their names for the purpose. In that way the book can be kept abreast with future amendments as they are made.

Parties to Actions. By Horace Hawes. Sumner, Whitney & Co., San Francisco, 188.

This volume is uniform in size and style with the above, and with the works on Marriage and Divorce and Real Property noticed in these pages last month. It is a pocket volume, and, as the author says in his preface, is intended not for the student so much as the practitioner, that the latter may find all the cases on the subject of "Parties" gathered with a complete index and ready for use on the shortest notice. This California publishing house certainly shows great enterprise in turning out such works on such useful subjects and in such convenient form.

Arguments in Favor of Proposed Bills to Relieve the U. S. Sup. Court. Collins, Printer, Phila., Pa., 1884.

These pamphlets set out and discuss the various bills introduced into congress by Judge Davis, Senator Bayard and others to relieve the overcrowded docket of the Supreme Court. The changes proposed have already been referred to on a preceding page of this No.

Meyer's Federal Decisions. Cases in the U. S. Supreme, Circuit and District Courts arranged by William G. Meyer, volumes 1 and 2. Gilbert Book Co., St. Louis, Mo., 1884.

These volumes show the greatest diligence on the part of the editor, and yet we can not feel sure of the usefulness of the work. It goes too far and yet not far enough. The Federal courts are authority upon constitutional law and the construc-

tion of Federal Statutes, and a work collecting all their decisions on these subjects and displaying them under appropriate heads convenient for ready reference would unquestionably be of great service to the bar. But the work before us aspires beyond this and aims to give as well the decisions of these courts on Common and Commercial Law, so that here we have page after page devoted to agency, attorneys, etc. This makes a very bulky volume and yet not an exhaustive one, and anyone who is "looking up a case" on Agency, for instance, must go at last to the U. S. Digest, where he will find all he has already seen in these volumes. Why not then go to the Digest in the first place? This is the view we take on a cursory examination. The publisher's work is handsomely done. The type is large and bold and very inviting to the eye.

## ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full—Alphabetically arranged according to their subject-matters.**

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Acknowledgment—

Married woman—Certificate—Mortgage—When a deputy clerk takes the acknowledment of a married woman to a deed he must indorse on the deed a memorandum of the acknowledgment, and if the clerk himself makes out the certificate he must include therein the indorsement of the deputy.

The certificate of the clerk in this case, which shows that the acknowledgment of the wife was taken by the deputy, but does not include the memorandum of the deputy or show that any was made on the mortgage, is defective and the mortgage does not pass the homestead. Leavell v. Edmunds, &c. May 1, 1884. Barren Cir. Ct. Opin. by Reid, P. J., Sup. Ct., dis. J. W. Jones for appellant; Porter & McQuown for appellees.

Adverse Possession—See Limitation, 1, 2—

Placing son in possession of land, intending to give it to him, is not possession adverse to the father. Polley, &c. v. Polley, ante, 801.

Agent—See Contract, 3.

Appeals—

1. Partial transcript—Where an appeal has been granted by the clerk of the Court of Appeals, and the appellant wishes to file a transcript of a part only of the record, he must file his schedule and assignment of errors in the clerk's office of the inferior court and gave notice thereof, and if he files a partial transcript without pursuing this course the appeal will be dismissed.
2. Completion of transcript—The court refuses to set aside the submission to enable the appellant to complete his transcript, which shows upon its face that it contains a part only of the record, his attention having been called to the defect by the steps taken in the case at the term prior to the submission on, and time having passed within which the Code provides the transcript shall be filed. Fearons v. Wright. April 9, 1884. Campbell Ch. Ct. Opin. by Richards, J., Sup. Ct., dis. E. W. Hawkins for appellant; John S. Ducker for appellee.
3. Sufficient evidence—Although the court is of the opinion that its conclusion from the evidence would have been different from that of the jury, yet, as the evidence was contradictory, it was the peculiar duty of

the jury to weigh it, and the verdict not being palpably against the evidence the court can not disturb it. Jeffries v. Sprigg. April 9, 1884. Hardin Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Hays & Bush for appellant; Wilson & Hobson for appellee.

4. Jurisdiction—This being an appeal from a judgment rendered since September 1, 1880, directing the payment to appellees of $87.50 out of a fund in court, this court has no jurisdiction of the appeal, the amount in controversy being less than $100. Lewis, &c. v. Dallam & Sooper. April 2, 1884. Henderson Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. Clay & Banks for appellants; R. H. Cunningham for appellees.

5. Instructions not part of record—An order of court reciting that "the court gave instructions 1, 2, 3 and 4," and refused "instructions A and B," does not make them a part of the record, and although certain instructions are copied by the clerk and designated by the numbers used in the order, they can not be considered. Commonwealth v. Mobile & Ohio R. R. Co. April 2, 1884. Hickman Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. C. H. Thomas for appellant; E. L. Russell for appellee.

6. Jurisdiction—The fact that the appellant had the right to be heard in this court in regard to his claim for the land, as to which the judgment denying a recovery is affirmed, does not entitle him to be heard as to his right to a judgment for the small balance of the proceeds of sale, the amount being only $37, not enough to entitle him to an appeal. Hackler v. Nicholson. April 26, 1884. Whitley Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Hill & Johnson for appellant; John Smith for appellee.

7. Practice—The particular errors complained of must be specifically pointed out in the grounds for a new trial or they can not be considered on appeal.

8. Exceptions—As no exception to the action of the court in giving or refusing instructions appears, the assignment of errors in regard to that action can not be considered. Ruark, &c. v. Mansfield, &c. April 16, 1884. Hart Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. D. R. Carr and G. W. Craddock for appellants; Julius Curle, Woodson & Macey and W. Lindsay for appellees.

9. Costs—Subsection 2 of section 93 of the Civil Code, which provides that a party failing to file a general demurrer "when or before he files a pleading other than a demurrer shall be liable to all costs resulting from such failure," does not apply to the cost of an appeal from a judgment by default. Stuart, &c. v. Trover. April 16, 1884. Owen Cir. Ct. Resp. by Richards, J., Sup. Ct., to petition for modification of opinion. Hallam & Gordon for appellants; Geo C. Drane for appellee.

10. Final order—An order sustaining a demurrer to a particular paragraph of a petition, without dismissing the petition as to that paragraph or refusing to allow the plaintiff to amend, is not a final order, and can not be appealed from. Leavell v. Edmunds, &c. May 1, 1884. Barren Cir. Ct. Opin. by Reid, P. J., Sup. Ct., dis. J. W. Jones for appellant; Porter & McQuown for appellees.

11. Final order in criminal case—Before an appeal can be entertained on behalf of the defendant in a criminal case there must have been a judgment of conviction.

In this case the court refuses to entertain an appeal from an order

overruling a motion of the appellant to discharge her from custody on the ground that she had been once in legal jeopardy, the court having discharged the jury after entering upon the trial. Smith v. Commonwealth. April 22, 1884. Daviess Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., dis. Haycraft & Slack for appellant; P. W. Hardin for appellee.

12. Final order—A judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt.

In an action for the settlement of an insolvent estate, an order adjudging that administrator be charged with a certain sum, "being the excess which was set apart to the widow over and above the amount of said estate to which she was entitled," no distribution being directed, is not final. Vandever's Adm'r v. Richart, &c. April 9, 1884. Henderson Cir. Ct. Opin. by Reid, P. J., Sup. Ct., dis. H. F. Turner for appellant; Yeaman & Lockett for appellees.

Assignor and Assignee—

Payment of assigned note—Notice—When the obligor in an assigned note pleads payment to the assignor he must aver that the payment was made before notice of the assignment. Kane, &c. v. Toebbe, &c. April 16, 1884. Campbell Chy. Ct. Opin. by Richards, J., Sup. Ct., rev. Nelson & Washington for appellants; J. S. Ducker for appellees.

Attorney—

Limitation—Interest—When an attorney has collected money for his client there is no right of action against him until a demand and refusal to pay, or at least some act manifesting a purpose to withhold the money; therefore, limitation runs only from the date of such act, and interest is recoverable only from that date. Cord v. Taylor, &c. April 23, 1884. Fleming Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. W. H. Cord for appellant; W. J. Hendrick for appellees.

Billiard Table—

1. Keeping billiard table—Pool—Under an indictment against a person for unlawfully keeping and having for public use a billiard table, not having obtained a license therefor, the proof showing that the table kept by the defendant was a pool table, upon which no other game than pool was played, it was for the jury to determine whether the table was a billiard table used as such, a question of fact depending upon the identity of the two games of billiards and pool.
2. Whether or not keeping a billiard table, without having obtained a license therefor, is an indictable offense is not necessary to decide upon this appeal. Commonwealth v. Montedonico. April 16, 1884. Jeff. Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. B. W. Duke, A. G. Caruth, Kohn & Barker and P. W. Hardin for appellant; Kinney & Kinney and H. Clay for appellee.

Breach of Peace—

One who enters on another's land and refuses to leave is guilty of a; those who assist him are trespassers. Johnson v. Clem, ante, 793.

Burden of Proof—

In murder cases burden is on Commonwealth as to malice, and as to insanity on defendant. Ball v. Commonwealth, ante, 787.

Common Carrier—See Pleading.

Common Schools—

Not entitled to any portion of State tax on railroads. Hewitt v. Trustees, &c., ante, 797.

Constitutional Law—

1. An act which cuts off all but two defenses in actions to recover taxes is unconstitutional. Louisville v. Cochran, ante, 833.
2. An act requiring voters to prepay their taxes is constitutional. Buckner v. Gordon, ante, 816.

Contracts—

1. Express contract proved to defeat action on implied—As appellants sought to prevent a recovery by appellee for the reasonable value of services by pleading an express contract, the existence of which the appellee denied, it was the business of the appellants to prove that contract. Fonda, &c. v. Smith. April 23, 1884. Jefferson Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. A. C. Rucker for appellants; Baker & Atchison for appellee.
2. Implied—No contract for compensation for services will be implied when, considering the relation of the parties, it is not to be presumed there was any expectation on the one part to pay, or on the other part to receive compensation. Mitchell's Adm'r v. Mitchell's Com. April 2, 1884. Metcalfe Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Geo. T. Price and James Garnett for appellant; J. W. Compton for appellee.
3. Liability of party representing himself as agent—One who makes a contract in the name of another, claiming to be authorized by him to do so, is personally liable to perform the contract if he had no authority to make it for the other. Wells v. Maley. April 16, 1884. Mason Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. G. W. Adair and Campbell & Worthington for appellant; Whittaker & Robertson for appellee.

Corporations—

One director of such an association as the appellee has no power to bind the association by contract or acquiesence. Israel, &c. v. Louisville Jockey Club and Driving Park Association. April 22, 1884. Jefferson Ct. Com. Pleas. Opin. by Hines, J., Ct. Ap., aff. T. B. Fairleigh and S. O. Graves for appellants; Russell & Helm for appellee.

Costs—See Appeal, 9; New Trial, 1.

Damages—

1. Liquidated—The courts will not enforce the payment of a sum agreed upon as liquidated damages when it amounts to a penalty or forfeiture or exceeds in a material degree the injury sustained by the breach of the contract.
2. The appellant performed work for appellees under a contract which provided that after seven days' notice the appellees might employ others to do the work, and at their option the contract was to become void, but without prejudice to any right of action against appellant, the amount

already paid to appellant to be "considered to be the full value of the work executed up to the time of the expiration of said notice." It was further provided that 80 per cent. of the relative value of the work performed to the first of each month should be paid on or before the 15th day of the same month. The appellant, before "pay day," abandoned the contract and was not paid the estimated 80 per cent.

Held—That appellees have no right under the terms of the contract to retain the 80 per cent. as liquidated damages. The 20 per cent. to be withheld was the sum intended to be treated as liquidated damages. Delaney v. Trustees Cincinnati S. Railway. April 8, 1884. Kenton Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. O'Hara & Bryan for appellant; C. B. Simrall for appellees.

Embezzlement—

Indictment for embezzlement—An indictment for embezzlement which charges in substance that the defendant being in the employ of, and the servant of, the Adams Express Co., as such was intrusted with its money, and feloniously converted to his own use $50 thereof, which he had received in his capacity as agent, is not good under section 1 of article 12, chapter 29, General Statutes, because it fails to aver that the Adams Express Co. is an incorporated company, and is not good under section 2 of that article, because it fails to allege that the money was delivered or intrusted to the defendant to be delivered at any place or to any person, and that he fraudulently converted it or secreted it for that purpose before he made the delivery, therefore, a demurrer to the indictment should have been sustained. The offense of embezzlement from the class of persons to which the Adams Express Co. belongs, or of which it is composed, is purely statutory. Fairleigh v. Commonwealth. April, 22, 1884. Carter Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. James D. Jones for appellant; P. W. Hardin for appellee.

Evidence—

Parol testimony inadmissible to vary written contract—A father and mother obtained from their son a certain sum of money which they invested for his benefit, together with money of their own, in a tract of land, the deed to which was made to the mother under a written agreement that the land was not to be sold except by the son's sanction, and if sold the amount he had advanced was to be invested in another tract of land. The mother sold the land and invested the proceeds in another tract, which a creditor of the son seeks to subject to the extent of the son's interest.

Held—That the mother can not show that the son was to forfeit both his money and the interest in the lands in the event he failed to work the farm or to cease his intemperate habits, such conditions being no part of the written agreement and there being no consideration therefor. Therefore, the creditor is entitled to have a sale of so much of the land as is necessary to pay his debt, not exceeding the amount originally loaned or invested by the son. Ellis, &c. v. Grigsby, &c. April 22, 1884. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Muir & Wickliffe for appellants.

Examining Courts—

Reduction of bonds—After a magistrate, or the county judge, sitting as an examining court, has passed upon the probable guilt of the prisoner and fixed his bail and committed him to jail in default thereof the authority of the court as a judicial tribunal is at an end, and a subsequent order of the committing magistrate, undertaking to reduce the bail is void, and it is held in this case that the Commonwealth is not entitled to money deposited in lieu of bail under such an order. Commonwealth v. Miller. April 2, 1884. Fulton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. C. H. Thomas for appellant; C. L. Randall for appellee.

Executions—

1. Lien by delivery to officer—So soon as a creditor places his execution in the sheriff's hands there arises, by operation of law, a lien upon all the debtor's estate subject thereto. Lacky v. Mimms' Ass'ee. April 23, 1884. Boyd Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. A. Lacky for appellant; Brown & Brown for appellee.
2. Trespass—The mere seizure of one person's property under execution against another is a trespass for which the claimant may at once institute an action for damages.
3. Indemnifying bond—If no indemnifying bond has been executed the claimant of property taken under execution against another may sue the officer, but if a bond with good security has been given he must look to it alone for redress.
4. The execution of the bond does not postpone the right of action, but simply shifts the liability from the officer to the obligors.
5. The fact that the claimant had executed bond to retain possession of the property does not prevent the institution of an action on the indemnifying bond for the damages previously sustained.
6. The condition of the indemnifying bond is that the obligors will pay the damages sustained in consequence of the seizure or sale of the property, and in an action on the bond the petition must allege, as a breach of that condition, the failure of the obligors to pay the damages sustained, but the omission of such an allegation would be cured by verdict. Brock, &c. v. Church, &c. April 2, 1884. Franklin Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Scott & Scott for appellants; J. & J. W. Rodman for appellees.

Final Order—See Appeal, 10, 11.

Fraud—

1. No relief as between wrongdoers—F. conveyed land to B. and W. without any consideration and for the fraudulent purpose of cheating his creditors. The grantor held possession until his death, and after that his widow and children continued in possession. Seventeen years after the execution of the conveyance W. brought suit for the recovery of the land, having purchased B's supposed interest at a sale under execution against B. F. also executed to W. his notes for the rent in furtherance of the original fraudulent purpose, and W. also seeks to recover upon these

   Held—That as B. and W. participated in the fraud of F. no relief can be afforded. Warden v. Field, &c. April 12, 1884. Ohio Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. McHenry & Hill for appellant.

Fraudulent Conveyance—

1. Jurisdiction to set aside—A court having jurisdiction to render a personal judgment for a debt has jurisdiction to set aside for fraud a conveyance to land lying in another county, and sell the land under attachment to pay the debt, the attachment being merely an incident to the proceeding to collect the debt. Such a suit is not a proceeding for the sale of land "under a mortgage, lien or other incumbrance or charge," such as is required by section 62 of the Code to be had in the county where the land lies
2. Repayment of purchase money—The deed to appellants being set aside on the ground of actual fraud, the court properly refused to direct the repayment of the purchase money except that which had been paid in discharge of a valid mortgage lien. Bogard & Bro. v. Buckner, &c. April 17, 1884. McCracken Ct. Com. Pleas. Opin. by Hines, J., Ct. Ap., aff. R. A. Burnett for appellants; W. D. Green and W. Lindsay for appellees.
3. Pendente lite purchaser—Pending an action to set aside a fraudulent conveyance the plaintiff had execution issued and levied on property he was seeking by his action to subject, and at the execution sale became the purchaser. By an amended answer the levy and sale were pleaded in bar of the action to set aside the conveyance on the ground that the plaintiff's legal remedy was complete.

   Held—That the levy and sale, though regular, furnish no bar to the action to set aside the conveyance, which is a cloud upon the title, but as the plaintiff became pendente lite purchaser of the property he was seeking to subject he will be bound by the purchase if the defendants are satisfied with it and he fails to show any fatal infirmity in the title under the execution sale, but the defendants are not bound by the sale unless they consent that it may stand. Gaitskill v. Stivers, &c. April 5, 1884. Bourbon Cir. Ct. Opin. by Hargis, C. J., Ct. Ap., rev. B. G. Paton and Cunningham & Turney for appellant.

Guardian and Ward—

1. Joint action by wards—Several wards united in one petition against their guardian and his sureties. The guardian was appointed for the plaintiffs jointly, and executed but one bond on this joint appointment pursuant to an order. The petition and the settlement of the guardian show that he received, held and accounted for the trust fund as undivided and as going jointly to the plaintiffs, and that they accept the final settlement, and claimed under it the joint debt which it declared to be due to them.

   Held—That there is no reason why the wards may not maintain a joint action for the sum thus admitted to be a joint debt.
2. Additional security—It is the duty of the county court to require additional security if at any time it has cause to believe the sureties are insolvent, and a formal order requiring the additional security and summons on the order are not necessary. It is a matter over which the court has exclusive control, and when its order shows that it has taken a new covenant it should be presumed that the power to take was exercised because of the duty to require.
3. Sureties treated as if in one bond—As the effect of the additional bond is merely to increase the security and not to provide the ward with an

additional cause of action, the ward may sue all the sureties in one action as if all were embraced in one bond. Sievers v. Havens. April 23, 1884. Pulaski Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Morrow & Newell for appellant, Curd & Waddle for appellee.

Husband and Wife—

1. Rights of wife as against husband's creditors—Where a husband in good faith, believing his estate to be solvent, had the notes for the purchase price of land sold by him made payable to his wife in payment of money borrowed from her, pursuant to an agreement made with her at the time he borrowed the money to secure her in that way, the court in the settlement of the husband's estate erred in adjudging that the notes belonged to the estate (which was insolvent) instead of to the wife. Davis v. Davis' Adm'r. April 1, 1884. Union Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Taylor & Chapeze for appellant; Haskins & Long for appellee.
2. Gifts from her to him through a trustee are prima facie fair as against a stranger. Golding v. Golding, ante, 806.
3. Gifts of note to wife—The fact that the wife had in her possession cash notes executed to the husband, claiming them as her own sometime before his death, and that he made no objection but proclaimed his intention to give them to her, and also declared he had done so, is sufficient to establish their gift and manual delivery to her, and the court acted properly in dismissing the petition of the administrator of the husband for their recovery. Galbraith's Adm'r v. Galbraith. April 17, 1884. Jefferson Ct. Com. Pleas. Opin. by Hargis, Ch. J., Ct. Ap., aff. Muir & Heyman for appellant; Isaac Caldwell, Isaac Palmer Caldwell and Badger & English for appellee.

Instructions—See Appeal, 5—

As the defendant had pleaded that there was no consideration for the notes sued on, and there was evidence conducing to sustain the plea, the court properly refused an instruction which in effect withdrew from the jury the consideration of the evidence. Fearons v. O'Hara. April 2, 1884. Campbell Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. E. W. Hawkins for appellant; Chas. J. Helm for appellee.

Insurance—

1. Distribution of proceeds of policy—When the charter of a mutual benefit society does not specify in what proportions the beneficiaries under benefit certificates issued by it are to take they must take equal shares.
   The husband of appellant held three benefit certificates, each payable to his wife and children. Held—That the widow is entitled only to an equal share with the children, and not to one-third, there being nothing in the charters of any of the societies to indicate that the beneficiaries should not share equally.
2. The holder of the certificates could not affect by his will their construction or the distribution of the proceeds. Hallan v. Gardner's Adm'r. April 23, 1884. McCracken Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. Bigger & Reid for appellant; C. S. Marshall for appellee.

Judgments—

1. Enforcement by rule—Appellees, creditors of appellant, had attachments issued and levied upon his property to pay the debts, and subsequently obtained from the court a rule against the appellant to pay their debts by bringing the money into court. The appellant responded to the rule by alleging that the property upon which the attachments were levied was sufficient to pay the debts, but the rule was made absolute. That judgment is reversed. The court say: "We are aware of no rule of practice—in law or equity, ancient or modern—by which the common law judge or the chancellor will enforce mere judgments for debt in such a summary way." Cofer v. Woodyard, &c. April 26, 1884. Hardin Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. H. Chelf and Wilson, Hobson & Sprigg for appellant.
2. Conclusive as to validity of mortgage—After judgment foreclosing a mortgage, in an action to which both husband and wife were parties and before the court, it is too late to question the validity of the acknowledgment by the wife or of the instrument itself. Those defenses should have been made before judgment was rendered. Cummins, &c. v. Forrest. April 22, 1884. Metcalfe Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Owens Miller for appellants; J. W. Compton for appellee.

Lien—

Commissioner's deed—Under the Revised Statutes and the Code of 1854 it was not necessary that a conveyance made by a commissioner of court should expressly state what part of the consideration remained unpaid in order to give a lien therefor as against subsequent creditors and purchasers. Ireland v. Mendall, &c. April 10, 1884. Lewis Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. E. F. Dulin for appellant; Wm. Lindsay for appellees.

Limitation—

1. Adverse possession under parol gift—Where a son entered upon land, claiming it under a gift from his father, and made lasting and valuable improvements and remained in possession, claiming it as his own for the period of fifteen years, this was an adverse holding, and gave the son a right to the land as against his father or his father's creditors, whether their debts were created before or after the gift was made, and, therefore, a creditor who accepted a mortgage upon the land from the father with notice of the possession of the son is not entitled to enforce his mortgage.
2. The mortgage by the father did not stop the running of the statute in behalf of the son, who was in possession. Lewis v. Lewis, &c. April 19, 1884. Morgan Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. John E. Cooper for appellant. John T. Hazelrigg for appellees.
3. Amended petition—New cause of action—An amended petition which presents no new cause of action, but simply makes the original cause more certain and specific, is not barred by limitation, the original petition having been filed in time.
4. Mortgage barred when debt is barred—When a debt is barred by limitation a mortgage executed to secure it can not be enforced. Jones, &c. v. Scott, &c. April 17, 1884. Bath Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., aff. Reid & Stone for appellants; R. Gudgell & Son for appellees.

Marshaling Assets—

Homestead—M. made a general assignment for the benefit of his creditors which did not pass his homestead, and after an execution in favor of appellant against him was placed in the sheriff's hands he assigned his homestead to the same trustee. The homestead was not exempt as to appellant's debt.

Held—That appellant acquired a lien upon the homestead by a delivery of the execution to the sheriff, and that lien having been adjudged to him he can not be allowed to participate in the distribution of the general estate until the unsecured creditors are made equal with him. Lackey v. Mimms' Ass'ee. April 23, 1884. Boyd Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. A. Lackey for appellant; Brown & Brown for appellee.

Mortgage—See Acknowledgment, 1—

Not necessary to state exact amount of debt, but must be capable of ascertainment. Morris v. Murray, ante, 821.

Negligence—See Railroads, 1—

1. Willful—In an action for willful neglect testimony tending to show that the decedent was killed while passing along the sidewalk of a public highway in the city of Louisville by a train backing across the highway at a speed of seven or eight miles an hour without a signal of any description, is held to be sufficient to support a verdict of willful neglect. Pennsylvania Co. v. Maloney's Adm'r. April 2, 1884. Jefferson Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Gibson & Gibson for appellant; J. T. O'Neal, W. R. Kinney, S. M. Bernard and W. Lindsay for appellee.
2. Owner of land not bound to keep it in safe condition for trespassers, yet must not wantonly expose them to injury. Branson, &c. v. Labrot, &c., ante, 827.

New Trial—

Upon payment of costs—Section 27 of chapter 2, General Statutes, is directory merely, and where a new trial is granted upon payment of costs and there is a failure to pay within forty days, unless the court abuses a sound legal discretion in refusing to set aside the order granting a new trial, its action should not be disturbed.

In this case, where there was a contest over a will, the court granted the propounders a new trial on payment of costs. After the expiration of forty days, but within the time allowed by the court, the costs were paid. Held—That under all circumstances, the administrator having no assets which he could reduce to money with which to pay the cost, the court acted discreetly in allowing the order to stand. Galbraith, &c. v. Galbraith, &c. April 17, 1884. Jeff. Ct. Com. Pleas. Opin. by Hargis, Ch. J., aff. Muir & Heyman for appellants; Isaac Caldwell and I. Palmer Caldwell and Badger & English for appellees.

Nonresidents—

Ratification of sale—A nonresident whose land was sold under a proceeding against him for that purpose having subsequently appeared and received all but a small part of the proceeds of sale, his heirs can not now recover the land upon the ground that the warning order was de-

fective. Hackler v. Nicholson. April 26, 1884. Whitley Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Hill & Johnson for appellant; John Smit for appellee.

Patents—

As to the rights of conflicting patentees to land. Davidson v. Coombs, &c., ante, 812.

Pendente Lite Purchaser—See Fraudulent Conveyances, 3.

Pension Money—

Not exempt from pensioner's debts after it has been received. Robion v. Walker, ante, 799.

Personal Representatives—

1. Unauthorized sale by executor—An executor having sold land and warranted the title as executor, which he had no authority under the will to sell, the purchaser must look to him and not to the heirs and devisees of the testator for indemnity.
2. Judgment against executor individually—It appearing that the executor has never been charged in a settlement of his transactions as executor with the purchase price of the land, he can not be prejudiced by a judgment in favor of the purchaser against him individually and not as executor. Collins v. Sanders, &c. April 15, 1884. Taylor Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Russell & Avritt and S. A. Russell for appellant; J. R. Robinson and R. A. Puryear for appellees.

Pleading—

1. Necessity of rejoinder—Where a reply contains merely a traverse and an allegation of facts which could have been given in evidence under the general issue no rejoinder is necessary. Harelmeier v. Sanders. April 23, 1884. Kenton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Collins & Fenley for appellant; H. P. Stephens for appellee.
2. Variance between pleading and proof—A plaintiff can not declare upon the contract of a common carrier to deliver goods at one place and recover upon proving a contract to deliver at another, and there being no issue to justify such proof a verdict thereon against the protestations of the defendant can not cure the defective pleadings. Pennsylvania Co. v. Malz. April 2, 1884. Jeff. Ct Com. Pleas. Opin. by Richards, J., Sup. Ct., rev. Reid, J., delivered separate opinion. Gibson & Gibson for appellant; John R. M. Polk and Frank Parsons for appellee.

Pleading and Practice in Criminal Cases—

1. Arrest of judgment—The only ground upon which a judgment can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.
2. Erroneous instruction not prejudicial—The appellants were not prejudiced by an instruction to the jury to fix their punishment, in case of guilt, at confinement in the penitentiary for a period of not less than one nor more than five years, instead of not less than two nor more than ten years. Creech, &c. v. Commonwealth. April 26, 1884. Clay Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. J. H. Tinsley for appellants; P. W. Hardin for appellee.

3. False swearing—Instructions as to confessions—Upon the trial of appellant under an indictment against him for false swearing, consisting, as alleged, in falsely stating, in answer to a question put to him by the grand jury, that he had not seen, or did not recollect to have seen, any other person than himself gaming, it was misleading for the court to give any instruction as to the weight to be given to any supposed confessions of appllant before the grand jury, the only confession made by him being that he himself had played cards for money, a different offense from that for which he was indicted and tried. McClure v. Commonwealth. April 26, 1884. Grayson Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. J. P. Hobson for appellant; P. W. Hardin for appellee.

4. Rape—Continuance—The appellant having been tried and convicted upon the charge of rape, the refusal of the lower court to grant him a continuance, to enable him to show that the prosecuting witness was an unchaste woman, is not a ground for reversal, the testimony introduced by appellant being alone sufficient to convict him. Prewitt v. Commonwealth. April 26, 1884. Grayson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. H. T. Wilson for appellant; P. W. Hardin for appellee.

5. Reasonable doubt as to degree of offense—Upon the trial of appellant on a charge of murder, the evidence tending to show threats and an assault by the deceased and such circumstances surrounding the killing as might have authorized the jury to find the appellant guilty of manslaughter only, it was error not to instruct the jury under section 289 of the Criminal Code, which provides that "if there be a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower offense." Fields v. Commonwealth. April 10, 1884. Woodford Cir. Ct. Opin. by Hines, J., Ct. Ap., rev. H. C. McLeod for appellant; P. W. Hardin for appellee.

6. Continuance—Of two brothers jointly indicted for murder, the principal was granted a continuance upon his affidavit showing that he had used legal diligence to obtain the presence of absent witnesses material to his defense. The affidavit showed that the absent witnesses were equally necessary to the defense of the other defendant, the appellant. Held—That appellant had the right to rely upon the legal diligence of his joint defendant, their witnesses being the same, and that under all the circumstances it was error to deny to appellant a continuance.

7. Instruction as to malice—The instruction as to murder should have required the Commonwealth to show the existence of malice at the time of the shooting, and an instruction "predicated upon" previous malice of the accused was erroneous. Walker v. Commonwealth. April 26, 1884. Knox Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. James D. Black for appellant; P. W. Hardin for appellee.

Practice in Civil Cases—

1. Misjoinder of plaintiff—Where the objection to a petition was that plaintiffs having several rights of action joined in the same petition seeking to recover as upon a joint right, a motion to require the plaintiffs to elect which one of them should remain in court and which should go

out did not raise the question whether there was a misjoinder of plaintiffs, but the question was raised by a general demurrer.

2. Special demurrer—Capacity to sue is presumed. If it does not exist objection is to be taken as provided by section 92 of the Code. Sievers v. Havens. April 23, 1884. Pulaski Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Morrow & Newell for appellant; Curd & Waddle for appellee.

Railroads—

1. Negligent killing of stock—In an action against a railroad company for the killing of stock by a train of cars, while the killing is prima facie evidence of negligence on the part of the company yet when the defendant has introduced as witnesses such of its employes as are presumed to know whether there has been any negligence on the part of the company, and they testify that there was no negligence, the prima facie case is rebutted and the burden shifted upon the plaintiff, and if he fails to contradict or impeach the defendant's witnesses the law is for the defendant.
2. Error in instructions—In such an action it was error to give an instruction requiring the jury to find against the defendant unless it had proved "there was no negligence or carelessness on the part of the defendant, its agents or employes," without regard to whether such carelessness or negligence caused or contributed to the accident. Lou., C. & L. R. R. Co. v. Bates. April 9, 1884. Gallatin Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Lindsay & Tiller and H. M. Winslow for appellant.

Rape—

Rape—Evidence—Upon the trial of a party on the charge of rape the declarations of the female made immediately after the commission of the alleged offense are admissible to prove that the offense was committed, and the rule is the same, although the female is incompetent to testify on account of immature age, idiocy or other mental defect. Philpot v. Commonwealth. April 3, 1884. Hart Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Martin & Watkins for appellant; P. W. Hardin for appellee.

Sales of Personal Property—

1. Where by the agreement the vendor is to do anything to the goods sold to put them into a deliverable state, or anything remains to be done to them for the purpose of ascertaining the price, as where the price is to depend on quality or quantity, the performance of these things, in the absence of circumstances indicating a contrary intention, is a condition precedent to the vesting of the property.
2. Where the property does not vest the only action which the seller has against the buyer for the breach of his promise to accept and pay is for damages for nonacceptance, and not for the full price of the goods as such.
3. The damages which the seller may recover of the buyer for the breach of his contract is, in general, "the difference between the contract price and the market price of such goods at the time when the contract is broken," but when the goods have no market price or value the measure of damages should be the price agreed to be paid.
4. When the vendor is ready and willing to deliver the thing at the place agreed on and offers to deliver it there, and the vendee notifies him not to deliver it, and that he will not accept or receive it, the vendor is ex-

cused from delivering it elsewhere than at the place where it is. He may then treat it as his own property, and recover the difference between its market value and the agreed price, or be may treat it as the vendee's property, and may sell it under his lien and recover the deficit, or may set the thing apart as the vendee's property, subject to his order, and recover the entire price. Wells v. Maley. April 16, 1884. Mason Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. G W. Adair and Campbell & Worthington for appellant; Whittaker & Robertson for appellee.

Slander—

Meaning of doubtful words left to jury—In an action for slander the words charged to be slanderous must be construed by the court in the sense that hearers of common and reasonable understanding would receive them, but when the words are not such as necessarily to import that the person referred to has been guilty of an indictable or infamous offense and are capable of two constructions, the one imputing guilt and the other not, the sense in which the words were used must be determined by the jury.

The words charged in this case do not necessarily import a charge of grand larceny, because they are reasonably susceptible of another meaning, but as the jury may have found, from all the facts and circumstances, that the words were intended to charge the offense of grand larceny, and that they were so understood by those hearing them, the determination of their meaning as spoken should have been left to the jury. Winstead v. Trice. April 22, 1884. Webster Cir. Ct. Opin. by Hines, J., Ct. Ap., rev. C. W. Cook, Geo. H. Towery and F. M. Baker for appellant; D. H. Hughes for appellee.

Street improvements—

1. Requisites of ordinance—The fact that the power is conferred upon the mayor and council to make street improvements "when in their opinion the public good demands it," does not make it necessary that the ordinance should recite the existence of the opinion, though the rule is different where the jurisdiction is made to depend upon the finding of a preliminary fact.
2. Apportionment of cost—Where the improvement is made at the cost of the lot owners the expense is to be apportioned among them in the ratio of the front feet of their respective lots. The cost of the work done in front of each lot can not be taken as the measure of the liability of that lot owner. Kerr v. City of Owensboro. April 16, 1884. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Williams & Powers for appellant.

Supersedeas—

Condemnation of property—If a railroad company has not pursued the terms of its charter in the condemnation of property the property owner has a remedy by injunction, trespass or ejectment, and it may be by other actions or proceeding, but he is not entitled to a supersedeas. Tracy v. E., L. & B. S. R. R. Co. April 17, 1884. Fayette Cir. Ct. Opin. by Hargis, Ch. J., disch. rule against clerk. W. Lindsay, D. G. Falconer and J. H. Mulligan for appellant; Breckinridge & Shelby for appellee.

Sureties—See Guardian and Ward—

1. The appellee became bound as surety upon a note executed by her son to appellants, and as a part of the same transaction appellants contracted with the son for the delivery to them of a large quantity of heading at a fixed price, when received to be in payment of the note, and by a subsequent agreement between appellants and the principal in the note the place of delivery of the heading was changed. The appellants having received sufficient heading to satisfy the note, and made advancements to the principal, instead of applying the heading to the payment of the note, it is held that they can not now look to the surety. The mere change in the place of delivery of the heading by a subsequent agreement can not be considered as a new and distinct contract for the delivery of the heading. so as to defeat the rights of the surety. the change being made merely for convenience. Chess & Wymond v. Whipple. April 5, 1884. Lou. Chy. Ct. Opin. by Pryor, J., Ct. Ap., aff. Young & Trabue and Wm. Lindsay for appellants; J. T. O'Neal and E. W. Hines for appellee.

2. Contribution—In an action by a surety against his co-surety for contribution, the relation being established, the burden is on the defendants to show why they should not be required to contribute.

   The evidence in this case, recited in the opinion, does not show such negligence on the part of the plaintiff as to charge him with the value of personal property mortgaged to secure him, which has been sold and removed from the State, nor does it show an agreement on the part of the plaintiff to take the property and pay for it. Knoll v. Fritz, &c. April 9, 1884. Kenton Chy. Ct. Opin. by Bowden, J., Sup. Ct., rev. Tisdale & Theissen for appellant; Simmons & Schmidt for appellees.

Taxation—

1. Taxation of real estate—In order to subject real estate to taxation for municipal purposes, where it has been included by an extension of the municipal boundary, there must be both benefits, actual or presumed, to the property from the city government and a city population so near it as renders it not unreasonable to extend the local power over it, and the facts of each case must control the application of the rule.

   A part of the land sought to be taxed for street improvements in this case is used as pasture land, a part for dairy purposes, a part for gardens and a part for ordinary agricultural purposes, and some is in the commons.

   Held—That the proximity of the land to the city gives its dairymen, its gardeners, and its owners such advantages as justify its taxation.

2. To authorize the imposition of the tax in such cases it is not necessary in every case to establish the fact that the value of the property has been increased. Other benefits derived by the property from its near location to the city may authorize the taxation.

3. Agricultural lands—The mere fact that property within a city is used for agricultural purposes does not exempt it from taxation for municipal purposes. Barrett, Tr., &c. v. Godshaw. Payne, Tr. v. Same. April 5, 1884. Louisville Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. Barret & Brown and R. W. Woolley for appellants; Young & Trabue, Goodloe & Roberts and Alex. P. Humphrey for appellee.

4. Infant's personalty—The personal property of an infant is taxable in the county of the infant's residence, and not elsewhere. The failure of that county to tax it can not confer upon the county in which the guardian resides the power to tax it. The fact that the guardian and ward resided in the same county at the time the relationship was first created can not affect the question, the ward's domicile having been changed in good faith. McCracken County v. Miller, &c. April 23, 1884. McCracken Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. Bloomfield & Eden for appellant; Henry Burnett for appellees.

5. Enforcement of lien for taxes—When in an action instituted by others to sell property the city of Louisville intervenes, claiming a lien for taxes, the city has the election to file written pleadings setting forth the facts constituting its cause of action, and when it does so they are to be regarded as the statement of the claim and as an abandonment of the right to have its claims determined without pleadings. Its rights, when this mode is adopted, are to be determined by its pleadings.

6. Pleading—To constitute a lien for taxes in such cases such facts must be alleged as will show on the face of the pleading the existence of the lien. It is not sufficient to allege that the levy ordinances "were in all respects published as required by law." The specific facts should be set out showing when and how the publication was made, and in what kind of newspaper.

7. Interest on taxes is in the nature of a penalty, and ought not to be allowed unless the law has been strictly complied with. Danber, Adm'r, &c. v. City of Louisville. April 16, 1884. Lou. Ch. Ct. Opin. by Reid, P. J., Sup. Ct., rev. John Stites and James Harrison for appellants; H. M. Lane for appellee.

Trusts—

Trustee may apply to court for instructions, and will be protected when he acts under the decree. Frazer, &c. v. Page, ante, 790.

Vendor and Vendee—

1. Fraud and mistake—Deficit—If in the sale of land through fraud or mistake more or less land is conveyed than was contemplated by the parties equity will relieve the injured party, whether the sale is by the acre or in gross; and even where a vendor innocently makes a misrepresentation as to quantity the right of the vendee is to have what the vendor can give, with an abatement of the purchase money for so much as the quantity falls short of the representation. Harelmeier v. Sanders. April 23, 1884. Kenton Cir. Ct. Opin. by Reid, P. J., Sup. Ct., aff. Collins & Fenley for appellant; H. P. Stephens for appellee.

2. Lien—Pleading—A petition to enforce a vendor's lien on land must set forth, in terms or substantially the terms of the agreement between the vendor and vendee, the character of title to be made, and that the vendor is both ready and willing to convey the title according to the contract. Barnes v. Bennett. April 16, 1884. Ohio Cir. Ct. Opin. by Reid, P. J., Sup. Ct., rev. J. E. Fogle for appellant; Walker & Hubbard for appellee.

Warranty—

Donees may recover for breach of warranty to land. Polley, &c. v. Polley, ante, 801.

Witness—

Code, section 601, giving court right to exclude witnesses is discretionary, not mandatory. Johnson v. Clem, ante, 794.

Wills—

Revocation—There being no proof that marks across the codicil to a will, relied upon as showing a revocation of the codicil, were made by the testator, and no such evidence as to the possession or repository of the paper as cut off all opportunity of others to make the marks, the court acted properly in omitting to give any instruction on the presumptions which might arise where obliterations, tearing, etc., are admitted to have been, or must necessarily have been, the act of the testator. Galbraith, &c. v. Galbraith, &c. April 17, 1884. Jeff. Ct. Com. Pleas. Opin. by Hargis, Ch. J., Ct. Ap., aff. Muir & Heyman for appellants; Isaac Caldwell, I. Palmer Caldwell and Badger & English for appellees.

# KENTUCKY LAW REPORTER AND JOURNAL

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## CODIFICATION.

### I.

BY MR. REINECKE.

The most prominent trait of the legal profession is its conservatism. With many this reverence for the existing order of things is developed to such a degree that they have never been adventurous enough to ascertain what Codification is or aims to do. Unheard or misunderstood, it is sealed by them with the seal of a prior condemnation.

Hooker says, in his Ecclesiastical Polity, that "the mixture of those things by speech which by nature are divided is the mother of all error." We all know how large a share of all legal contentions springs from misapprehensions of the litigants, and this fact seems to be recognized by that curious Americanism which calls it a misunderstanding when two men are fighting.

But if there is anybody who opposes Codification because he imagines that its friends propose to make new law, let his mind at once be disabused. What we aim to do is purely and simply to bring the old, existing law into orderly, symmetrical form; to collect it from the wilderness of books through which it is scattered into one compact volume, and to put it into

language at once so exact that the jurist will accept the definition as correct, and so plain that the rule will be understood by the great mass of the people whose life and business it affects, if they will only bestow upon it that thought which they give to their other business affairs. Codification, therefore, is compilation, not legislation.

Do the lawyers doubt that for the legal profession such a volume will save incalculable time? Hear what Mr. Austin Abbott says, whose authority will not be impugned: "There are questions constantly discussed at the bar, simply because counsel and attorneys on one side or both are not aware that they have been settled, and because the court is not so absolutely sure that they have been settled, or have not been unsettled again, as to stop counsel in the discussion. There are questions constantly arising in business on which a lawyer has to spend hours, perhaps days, in finding, and satisfying himself that he has found. a reliable statement of what is settled. A Code is the authoritative statement of what is the settled law."

Does he overstate the case? Leaving out of view entirely the vast bulk of statutory law, there are 5,500 volumes of reported decisions in the English language in which we are expected to seek the common law. They are increasing at the rate of one hundred volumes annually. By a legal fiction which under existing circumstances is almost a mockery, all the people are presumed to know the law. At least the duty is imposed upon them, at their peril, to obey its commands, although they neither know them nor can know them. Must it not—slowly perhaps, but surely—destroy in the hearts of the people that confidence and hearty acquiesence upon which all law and all order rests, to have withheld from them the means of knowing their rights and their duties? No one will be bold enough to deny that it is their good right to know the law. But is that vast library of 5,500 volumes of decisions accessible to them? And if it were, could they find the law in them? Suppose then that they despair of the task (as they surely will if they try it) and that they call to their aid the best legal advice which money, liberally bestowed, can buy. Can the lawyers, without wading through all these reports, do

more than guess at the law? We should be insincere if we failed to confess that the best legal marksmen occasionally make very wild shots. And even if we have guessed with such apparent safety that we felt secure in advising a client unhesitatingly to act upon our conclusions, when he has acted upon our advice and got into trouble and relies upon us to get him out and our case comes to trial, we may find to our dismay a law maker in the place of the judge upon the bench, who, creating a new rule, which until then had no existence, applies it to a transaction entered into upon the faith of the law as theretofore expounded. But he could not do it if the old rule was written down in a statute, instead of an opinion.

So it was recently said by Mr. Irving Browne, of the Albany Law Journal, the ablest and most fearless advocate whom the cause of Codification has ever had in the public press: "No lawyer questions the authority of a statute in court. The only way we can get rid of it is by legislative repeal or modification, no matter how small a majority has passed it. But every decision, especially every decision pronounced by a divided court, can always be assailed in court by a lawyer with some prospect of success, or at all events furnishes a ground of advice to his client to take his chances of reversing the uneasily settled doctrine. Besides, conflicting statutes are very rare; conflicting decisions can be found on any topic in every volume in any year, and frequently in the same court. Legislative enactment is much more difficult to procure than judicial distinguishing, doubting, denying and final overruling. To the public and professional mind, then, written laws have the superior sanction, and they are settled upon a much more stable basis than judicial legislation."

This statement of a self-evident truth must carry conviction to every candid mind. And we have no unwritten law in existence. It is paradoxical to call that a rule of our conduct which is not certain or which is unknown. Unless it is already written down in a statute or in the reports the law does not exist at all, although we all know to our cost how it is sometimes evolved from the inner consciousness of the court, and how the nonexisting law becomes a cudgel with which existing rights are beaten over the head. This is worse than the measure of

the chancellor's foot, according to which equity jurisprudence was anciently said to be administered, for it was always honestly admitted to be of individual judgment; but that species of ex post facto legislation which the judge manufactures is too shamefaced to acknowledge its origin, and it, therefore, always hides its brand new face behind some drapery designedly fashioned into some venerable pattern of motheaten antiquity. And justly so, for, not to put too fine a point upon it, it is law making under false pretenses.

It is too late in the day to doubt sincerely the possibility of making a code of the body of the existing law. With Mr. David Dudley Field's New York Code before the world—the best lexicon of legal definitions and of the outline of jurisprudence which was ever written—the practicability of condensing the law of the land into clear, concise rules, making one volume of moderate size, is no longer an open question. It is just as futile now for the army of legal Podsnaps to continue the jeers with which they first greeted this undertaking, as it would have been for the junta at Salamanca to have derided the folly of Christopher Columbus, after the prow of his caravel had touched the shore of San Salvador.

The responsibility, the solemn duty of originating this greatest of all law reforms rests with the legal profession. If the people knew the necessity as we know it, they would force from us this inestimable gift. But they do not, and we may as well win for ourselves the credit of having given it to them without coercion. For more than two centuries to the top story in the first quadrangle of All Souls' College at Oxford a great sun dial has been affixed, bearing upon it in large golden letters the words: Pereunt et imputantur, referring to the fleeting hours marked by the large pointers below. Time passes, and it goes down, too, against our account.

Louisville, Ky. WM. REINECKE.

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## II.

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### BY MR. SEYMOUR.

Is it desirable that the body of the law be enacted in a Code? If law consists of the commands of the supreme power in a

State, no reason exists making it undesirable that those commands be expressed. The one real objection to codification is that it will limit the legislative powers of the courts. By a singular fiction the courts, from time immemorial, have pretended that they simply declared the law, and did not make the law; yet we all know that this pretense is a mere fiction—as much a fiction as the losing and finding in trover, and the lease, entry and ouster in ejectment. The effect of this fiction has been to obscure the boundaries of the legislative function of the courts. In times when parliaments were seldom called together the bulk of legislative work had to be done by the courts; in these times when legislatures meet biennially, the legislative powers of the courts ought to be reduced to a minimum. Judicial legislation is always the making of a rule to apply to an act already done. Such has been its character from the time of the famous case of Zelophehad's daughters in the Pentateuch, XXXVI, Num. 6-12, unto this present. The boasted element of elasticity is simply uncertainty. Every settled doctrine of the law ought to be incorporated into a statute, so as to be put out of the reach of the courts as far as possible. Judicial discretion has been of service, and yet discretion has in it a strong element of do-as-you-please. This objection to Codification seems to me its strongest recommendation.

True, the methods of legislation of the general assembly are inadequate to the work to be done, and many of the statutes are far from models; for this the remedy is an abandonment of the inadequate methods, not vicarious legislation by the judges.

Is Codification practicable? That it is a work requiring abilities of a high order on the part of the codifiers, and also requiring patient, persistent, attentive labor can not be doubted. It had better never be attempted than be done in a slovenly style. One ability certainly the codifiers should possess—the ability to write plain English, and that ability they should use freely.

Kentucky has not, during this generation, had any work done bearing a close analogy to Codification. The revision of the statutes and that of the Code involved new legislation—changes of the substance of existing laws. Evidently the pro-

posing of new legislation is a widely different kind of work from the codifying of existing laws.

The work must not be done in haste; a single hasty chapter would be an unpardonable defect. One carelessly worded sentence would be a grievous error in the execution of the work; every section should be drawn with as much care and thought as a plea in abatement at the common law.

The question of practicability resolves itself into a question as to the patience, attention, care and thought of the codifiers. In order that a Code may be produced that is worth having, the legislature and the codifiers must possess a large amount of that greatest of political virtues—self-control; and this virtue is unfortunately a rare one.

Two branches of our law need especially to be codified, the law of crimes and the law of coverture. After the General Statutes were enacted the writer of this article undertook to make for his own use an index of the session acts of a general nature as they should come out. No one who has not engaged in some work of that kind will imagine how many criminal statutes are enacted at each session of the legislature. Had the criminal law been codified, each addition to it would at once take its place in the Criminal Code, provided care were taken in the drafting of the new statute. As it is, the criminal statutes of every session are an unassorted mass of legislation creating new crimes, and not harmonious with existing laws. It was the opinion of the men who framed the present Constitution that there ought to be a Criminal Code, and the failure of the successive legislatures to keep that idea in mind has been a grievous omission.

The tendency to create new crimes is one of the most striking features of current legislation. As to criminal statutes, however, more than all others, it is matter of importance that there be a full publication. As Austin shows (and indeed Barbeyrac had previously shown the same), law being a command involves not only a wish on the part of a lawgiver as to the conduct of his subjects, and a sanction against disobedience, but also a making known of the wish to the person who is to obey. The reason underlying this principle is that the end of the law is not punishment, but obedience. A codification of the crim-

inal law followed up by an arrangement of each session's criminal statutes with reference to that Code, would remove from the jurisprudence of this State a great reproach.

As to the law of coverture the need of Codification is equally apparent. When it is remembered that the number of married women among us almost equals the number of voters, and that they labor under no natural disability by reason of defect of mental power; when it is further remembered that at common law the disability of coverture was almost as sweeping as that of lunacy, it is no wonder that efforts should be making to change the law, and, in view of the methods of legislation among us, it is no wonder that the changes have been patchwork. But for the necessary limit in length of an article like this, it might be well here to trace the legislation of this State, judicial and otherwise, since 1860 on the subject of married women. It is a remarkable body of laws, strangely disconnected and inharmonious. It is safe to say that no lawyer in this State to-day knows what is the Kentucky law as to married women's separate estate. The amount of litigation produced by the uncertainty is not edifying. The recent tendency of decision is to increase the uncertainty. Probably the result can not be avoided by any care of the courts, if the labor of making laws on this subject is to be thrust upon the courts; and indeed it must not be forgotten that a precedent so far as it is authority at all is a law, differing from other laws indeed in being the work of courts and in being arrived at through a competition of conflicting analogies. Be that as it may, the law of coverture (affecting as it does the rights of most of the adult citizens of this State) ought to be settled by statute, and not by any haphazard, patchwork statutes either.

The need of codification in the two matters named is urgent. It is unnecessary to extend this article further for the purpose of showing that codification of other departments of the law, while perhaps not a matter of such pressing necessity, is thoroughly desirable.

Louisville, Ky. C. B. SEYMOUR.

## KENTUCKY COURT OF APPEALS.

## SHERMAN v. COMMONWEALTH.

(Filed May 3, 1884.)

**1. Constitutional law—Title of act—The title of an act for "the incorporation and regulation of life insurance companies" relates wholly to one subject.**

**2. Insurance—A particular corporation is held not to be a charitable association, but an insurance company, and liable to fine for not taking out a license as such.**

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hargis.

The constitutionality of "An act for the incorporation and regulation of life insurance companies" is questioned on the ground that it is in conflict with that provision of the Constitution which declares that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in its title."

The subject of the act is life insurance, and the incorporation and regulation of companies of that kind naturally relate to the subject. Those terms are not foreign to the subject and the act refers wholly to life insurance, hence it is not unconstitutional.

By an act to "exempt certain benevolent and charitable associations from the operation of the general life insurance laws of the Commonwealth," approved March 6, 1876, it is provided: "That all Masonic orders, Odd Fellows' associations, and all lodges of the Ancient Order of United Workmen, Knights of Honor, and all other associations of persons, incorporated for the sole purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members, are hereby declared not to be life insurance companies in the sense and meaning of the general life insurance laws of this State, and they are, and shall forever be, exempt from the provisions of said general insurance laws," and the question is whether the "Mutual Reserve Fund Life Association" of New York is a life insurance company in the meaning of said act. It is incorporated under an act of the New York Legislature, entitled "An act for the incorporation of societies and clubs for certain

lawful purposes," and the acts amendatory thereto. The certificate of incorporation declares that it is to be known as a life association and that the particular business and object of such society is "the mutual benefit of ourselves, and all others who may become members." The association is authorized to adopt a constitution and by-laws, which has been done, and by which the board of directors have power to fix the amount and rate of assessments, fees and dues, and appoint an executive committee who shall determine all salaries and expenses. A death fund and reserve fund are features of the corporation. Through the powers of incorporation and the exercise of authority to adopt a constitution and by-laws the most extensive life insurance business can be carried on, and if the annual report of the association be genuine and truthful, and not a mere advertising of the asserted virtues of this mode of insuring, the annual business for 1882 resulted in the issuance of 6,892 certificates of membership, amounting to $30,105,250, the payment of $77,927.52 as commissions to agents, and of nearly as much more in expenses, while less than $54,250 were paid for losses and claims.

These facts, reasoning from effect back to cause, demonstrate that this association is in substance and purpose a life insurance company no matter what else it may be named or called. If any doubt about this should exist the form of application and certificate of membership will dispel it. The application requires answers to all questions as to age, birth, health, family history, personal history, habits, diseases, former assurance of the applicant, etc., as minutely and strictly as the best conducted insurance companies exacted. The certificate of membership is filed with the usual conditions of ordinary policies, and closes as follows: "This certificate is issued and accepted subject to the express condition that if any of the payments above stipulated shall not be paid when due, at the office of the association in the city of New York, or to an agent of the association furnished with a receipt signed by its president or secretary; or if the member, during the continuance of this certificate, shall engage in blasting, mining, submarine, or aeronautic operations, or the production of highly inflammable or explosive substances; or upon a railroad as brakeman or

baggageman, or as conductor of a freight train; or in working or managing a steam engine in any capacity; or shall engage in service upon a sailing vessel, or shall enter any military or naval service whatever (the militia when not in actual service excepted), without the consent of this association therefor, in either of the foregoing cases, given in writing by the president or secretary thereof; or if the member shall die by his own hand, within two years from the date of this certificate, whether sane or insane, or if any of the statements, answers, or declarations made in the application for this certificate, which application is hereby referred to and made a part hereof, are in any respect untrue; then, and in each and every such case, this certificate shall be null and void, and all payments made thereon shall be forfeited to the association." The application stipulates that if the applicant "shall omit or neglect to make any payment as required by the conditions of such certificate, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association." The elastic provisions of the certificate of incorporation, tested by its constitution and by-laws, the terms of the application and certificate of membership, clearly show that this association was not incorporated or formed, nor has it been operated for "the sole purpose of mutual protection and relief of its members," etc.

It is an insurance company attempting to assume the sacred name and purpose of a benevolent and charitable association. The distribution of the profits is disguised by designating them payment of salaries, fees and expenses, which appear to be enormous in view of the payment of losses reported. We are, therefore, satisfied that benevolence and charity are not the sole mission of the Mutual Reserve Fund Life Association of New York.

The judgment assessing a fine against appellant for doing business as its agent in this State without license is consequently affirmed.

W. P. D. Bush for appellant.

L. C. Norman and P. W. Hardin for appellee.

# JOHNSON v. COMMONWEALTH.

(Filed May 15, 1884.)

1. Change of venue—Defendant in a criminal case is entitled to a change of venue whenever it appears from the opinions and facts stated by a number of credible witnesses that he can not have a fair trial in the county where the offense was committed, and the witnesses for the Commonwealth merely express a contrary opinion without giving the facts to sustain it.

2. Homicide—Extenuation—Sudden heat and passion—The accused hearing from his sister that A had whipped their brother, became greatly enraged, went out instantly and killed A. Held—The circumstances of the whipping, of which accused did not know until after he had done the killing, are incompetent to prove provocation. The provocation which excuses must be something which a man knows of and resents at the time he does the killing, not what time or accident afterwards brings to light.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having been indicted at the February term, 1882, of the Logan Circuit Court for the murder of George Richards, was at the February term, 1884, tried and convicted, and his punishment fixed at death.

The first error complained of that it is necessary to notice is the order of court overruling appellant's application for a change of venue.

In his petition, verified by his affidavit, he stated that on account of the prejudice of the people of Logan county against him he could not have a fair and impartial trial in that county. Accompanying his petition were filed affidavits of nine persons, not of kin to nor of counsel for the defendant, including the judge of the county court and the county attorney, in which they stated they were acquainted with the state of public opinion in that county, and that they believed the statements of appellant's petition for such change of venue were true.

The judge of the county court in his affidavit stated that he was impressed with the necessity of removing appellant from the jail of Logan county in order to prevent violence being done him by a mob, by the feeling then prevailing in that community that such violence was liable to occur. He stated that he had no evidence of the intention of anyone to commit such violence, but that there was an intangible and indefinite feel-

ing of danger pervading the community, and he assumed the responsibility of removing appellant on that account.

In his affidavit the county attorney stated that he had heard appellant's case discussed by men from all parts of the county, and was satisfied he could not have a fair trial there, owing to the prejudice against him. He stated that the principal ground for his belief was the fact that about two months previous to the term of court at which appellant was tried and convicted a mob took two negroes from the jail and hung them, and it was complained throughout the county that the mob did not complete its work, and that it ought to have hung appellant, who was in jail at the time.

Previous to the amendment of the General Statutes the defendant in a criminal prosecution was entitled to a change of venue as a matter of right, from the county in which the crime was alleged to have been committed to an adjoining county, upon his petition, verified by his affidavit, and the affidavit of two credible persons acquainted with the state of public opinion, to the effect that he could not have a fair trial in the county where the prosecution was pending. (Mickey v. Commonwealth, 13 Bush, 237.)

But by an act approved April 1, 1880, subsection 2 of section 1, article 4, chapter 12, has been amended by adding the following, viz: "And the court shall, on said motion, hear all witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue."

In this case, as he was authorized to do by the act just quoted, the Commonwealth's attorney called and examined seven witnesses, who stated in substance that they were acquainted with the state of public sentiment in different portions of the county in reference to appellant, and knew of no reason why he could not have a fair and impartial trial in that county in the ordinary and legal way of selecting a jury.

The legislature did not intend by the amendment to the General Statutes to deprive a defendant in a criminal prosecution of the right to a change of venue when it is necessary, or even probably necessary, to a fair and impartial trial, but the object of it was simply to give to the court the right to hear

evidence against as well as in favor of the application, and, in the language of the law, "from the evidence determine whether or not the applicant is entitled to a change of venue."

When the application is made in good faith, and it appears from the evidence that there are reasonable grounds to believe that the defendant can not have a fair trial in the county where the offense was committed, it is as much the duty of the court now as it was before the adoption of the amendment to make an order for such change.

In addition to the sworn statements of seven credible and disinterested witnesses, two officers, the county judge and county attorney, who are presumed to be acquainted with public sentiment in the county, not only give as their opinion, but state such facts as make it obvious that appellant could not have a fair and impartial trial in that county. In our opinion, therefore, appellant was clearly entitled to a change of venue, notwithstanding the statements made by the witnesses introduced by the Commonwealth, which were merely negative in their character, and the court erred to the prejudice of appellant's substantial rights in overruling his application.

The court did not, in our opinion, err in refusing to permit John Johnson, the brother of appellant, to detail the particulars of the alleged whipping inflicted upon him by the deceased Richards in the absence of appellant.

There is no evidence showing or conducing to show that the killing was done in the necessary self-defense of appellant, and, as the record now stands, it was either murder or manslaughter.

Mrs. Welch, the sister of appellant, was permitted by the court to state all that occurred between herself and appellant when he arrived at her house after an absence of several days from the neighborhood, and all that she told him in relation to the whipping of their brother by the deceased.

As, according to her statement, appellant became greatly enraged and excited when informed by her of the occurrence, and went from her house immediately and directly to the tobacco barn where he, without any altercation or delay, shot and killed Richards, the only knowledge he had in regard to the whipping must have been derived from his sister. And as the heat and passion, under which it is contended for him he took

the life of deceased, was caused solely by the whipping of his brother as narrated to him by his sister, it was not competent, because not pertinent, for his brother on the trial to detail the particulars of the whipping as it actually occurred. "The provocation which extenuates in the case of homicide must be something which the man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed, not what time or accident may afterwards bring to light." (Roscoe's Criminal Evidence, 737.)

Appellant was not influenced to kill deceased by the whipping of his brother as it actually occurred, for he was not present, but all the knowledge he had in regard to it he derived from his sister, and consequently whatever consciousness he had on the subject, or feelings were aroused, were caused by her recital of the occurrence to him.

We do not deem it necessary to notice other errors complained of, but for the reason indicated the judgment must be reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

T. A. Frazer, Theo. B. Blakey and E. W. Hines for appellant.

P. W. Hardin for appellee.

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## GRINSTEAD v. SCOTT.

(Filed May 1, 1884.)

**Contested election—A defeated candidate has the right to contest the election of his successful opponent before the board of contested elections, on the ground of such opponent's ineligibility, provided such ineligiblity does not arise out of a criminal act for which accused is entitled to a jury trial.**

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Hargis.

Grinstead and Scott were candidates for county clerk of Metcalfe county, Scott was elected and Grinstead contested the election on the ground that Scott was ineligible because he had not resided in the county one year next preceding the election.

The contesting board sustained a demurrer to the notice of contest given by Grinstead to Scott and dismissed the proceedings. An appeal was taken by Grinstead to the circuit court,

where Scott again interposed a demurrer to the notice and it was sustained, the proceedings dismissed and judgment for costs rendered against Grinstead, who has appealed. From the argument of counsel we suppose the contesting board and the circuit court dismissed the contest because Grinstead had no interest in the controversy or that Scott would be denied a constitutional right if his ineligibility were inquired into by the board. The notice is sufficiently explicit. It points out the precise ground of contest (Raney v. Ratcliff, 5 Ky. Law Rep., 471; Dryden v. Swinburn, 15 West Va., 234.) Subsection 5, article 7, chapter 33, General Statutes, and subsection 8, section 1, article 7, ibid, provides: "Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered." It was decided in the case of Stevens v. Wyatt, &c., 16 B. Monroe, 432, that the county contesting board properly determined that Garrett was ineligible to the office of county clerk because he had no certificate of qualification, and had not been a resident of the county for one year next preceding the election, although the contestant, Stevens, had been defeated at the polls by Garrett by a majority of forty-eight votes. That case settles the right of a defeated candidate to contest the election of his successful opponent on the ground of ineligibility of the latter.

It is needless to enter upon the theories of appellee's counsel as to the question whether Grinstead has any material or substantial interest in the contest. It is enough to say that the statute requiring a new election to be ordered on the ascertainment by the board of the want of qualification of the person returned would be a dead letter if none but those entitled to the office could contest the election, for then no new election could be ordered, and no contest had in which the want of qualification could be shown.

Thus the statute, by a species of logomachy, could be rendered wholly nugatory and the precedent cited which has not before been questioned, disregarded or overruled. We see no reason for adding any qualification to a contestant who has been the opposing candidate at the election which would deny to him the right to contest the election on the ground of ineligibility where such ineligibility does not rest upon a sup-

posed criminal act which has not been judicially ascertained, and in the determination of which the party charged is entitled to a trial, upon indictment, by a jury of his country. The case of the Commonwealth v. Jones, 10 Bush, 725, instead of militating against the views above expressed clearly recognizes the doctrine, although the question here presented was not involved or properly before the court in that case for decision. It is said in the course of the reasoning of the opinion, page 745: "The board had the power to ascertain whether Jones was a citizen of the United States; whether he had been a resident of the State of Kentucky two years next preceding his election; whether he was twenty years of age; and whether he had a certificate, &c." And surely if this be true, the county contesting board had the power to ascertain whether Scott had been a resident of the county of Metcalfe one year next preceding the election. There is no crime or misdemeanor involved in the failure of Scott to be a resident of the county for one year next before the election, consequently none of his constitutional rights are affected by a decision of that question by the board upon whom the legislature had the power to confer such jurisdiction.

It is true that subsection 2 of section 4 of article 7, chapter 33, General Statutes, requires the board to give its decision in writing and sign it in duplicate, and also to enter one copy on the minutes of the court, but the supposed dereliction of the board in failing to keep minutes and comply with that section does not appear by this record, and the question sought to be determined is not presented by the record, as there are no facts to justify the position of counsel for appellee.

The presiding judge of the county court, who presided over the deliberations of the board, certified that the record or transcript filed in the circuit court on the appeal to that tribunal was a true copy of the record and statement of costs in the cause of Grinstead, contestant, against Scott, contestee. His certificate was attached to the record at its close and was officially signed by him. The record he thus certified bears an entry made and signed by the clerk of the circuit court that it was filed September 10, 1883. It embraces a copy of the decision of the board as well as the notice and return, and the record before

us shows a complete transcript of papers, which purport on their face to be the original papers and depositions used in the contest, and the clerk of the circuit court certifies that it is a true and correct transcript of all the papers, proof and judgment of the court as appears from the record on file in his office. The presumption must, therefore, be indulged that the contesting board did its duty and kept minutes of its proceedings. This presumption is strengthened also by the certificate of the official head of the board, which clearly implies that a record was kept by them, from which the copy he certified was taken. And as what appears to be the original papers and depositions used in the contest are on file in the circuit court, it must be presumed that the board did its statutory duty and filed them in the circuit court, through the clerk thereof, who is the proper person and custodian to whom such papers should be delivered by the board. For if through that channel the circuit court comes into possession of the original papers, there can be no objection to the mode of filing or obtaining possession from the board.

The vital question is, are the papers the originals? Of this we are fully satisfied from the official record itself for the reasons above given.

As the circuit court dismissed the proceedings on demurrer to the notice, without deciding upon the questions of fact involved, we decline to decide the latter question until a final determination thereof by the circuit court on proper presentation to us by appeal. The demurrer should have been overruled and the cause heard upon the merits.

Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer and for further proper proceedings.

Porter & McQuown for appellant.

A. W. Scott and W. Lindsay for appellee.

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## BALL, &c. v. HANCOCK'S ADM'R, &c.

(Filed May 15, 1884.)

**1. Deed—Recital—A recital in a deed that a certain agreement had been previously made is equivalent to making the agreement anew, and covenant will lie on such recital.**

**2. Rents and profits—Estate in land—The grant or devise of the rents and profits of land is equivalent to the grant of the land itself. And the grant or devise of land with the power of alienation carries a fee unless the first taker is vested with a life estate only and the power of disposition is annexed to the remainder.**

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hargis.

This was an action by the administrator of Washington B. Hancock, deceased, to ascertain his interest in lots number 18, 19, 20 and 21, lying on Jefferson and Fourteenth streets in Cosby's enlargement of the city of Louisville, and to subject it to payment of his debts, there being, as alleged, an insufficiency of personal estate for that purpose. The heirs of Marion Sophia, deceased wife of Washington B. Hancock, were made parties and claimed, by appropriate pleadings, two-thirds interest in the lots which the administrator was seeking to sell. Their claim was based upon a deed of trust executed by her brother Henry S. Ball on the 10th of April, 1845, to Fortunatus Cosby. The material parts of the deed which bear upon this controversy are as follows: "That the party of the first part, the said Ball, in consideration of a promise heretofore made to the said Marion Sophia to convey the property hereinafter mentioned to her, and for the further consideration of a full, complete and final settlement of all law suits, disputes, and demands of what character they may be, between the said Hancock and wife, a full relinquishment of which between the parties is hereby agreed upon and is witnessed by this indenture and for the further consideration of one dollar." Then follows the grant and sale to Cosby of said lots, with a general description thereof, the deed concluding in these words: "Upon trust nevertheless that the said Cosby, his heirs and assigns, shall permit the said Hancock and the said Marion Sophia to remain in quiet and peaceable possession of said parcel of ground and the improvements thereon, and to take the profits thereof to the use of the said Marion Sophia and her heirs, and upon this further trust that the said Cosby will, upon the written request of the said Marion Sophia, join her in any conveyance to any person for any purpose of the whole or any part of the described premises; the funds or proceeds arising from

such sale or disposition to be used invested, and disposed of as the said Marion may direct, the said Cosby exercising no control over the said premises and liable for no neglect. And also upon the further trust that the said Cosby, his heirs and assigns will hold the said premises to the use—the said Marion Sophia solely and separately during the joint lives of the said Marion Sophia and the said Hancock, subject to the direction of the said Marion Sophia as above directed; and from and immediately after the death of said Washington Hancock, her husband as aforesaid, in case the said Marion Sophia should survive him, then to the said Marion Sophia during her natural life, and after her death to the heirs of the said Washington Hancock. But in case the said Marion Sophia should die during the lifetime of the said Hancock, then to the use of such persons for such estates and changes as the said Marion Sophia by her last will and testament in writing, or by any instrument of writing in the nature of or purporting to be her last will and testament, executed in the presence of two witnesses, should direct, limit, or appoint, and in default thereof, then to the use of the children of the said Hancock, their heirs and assigns."

They had only one son, John by name, who died in 1870, after he became of age and before either of them. She made a will during the lifetime of their son and devised two-thirds of the lots to him for and during his natural life, and the other third to her nephew, John B. Swan, in fee simple. She died in the lifetime of her husband.

It is contended that the son, John Hancock, took a vested remainder in the whole of the lots, subject to be defeated by any disposition which his mother might make by last will, or by an instrument in the nature of last will, and that his father being his only heir was entitled to two-thirds of the lots by descent.

The statement of the consideration, which is composed of a promise to convey the property to her to settle controversies between her and her husband and of one dollar, recites an agreement that must have been made before the execution of the deed. The recital being equivalent to an agreement to convey to her, we must construe the remainder of the instrument in view of that object and so as to carry out the contract

of the parties unless a clear and manifest purpose not to do so is exhibited by the language of the instrument itself. In Bank of Kentucky v. Vance, 4 Littell, 172, the court said: "The recital of an agreement in a deed is in law equivalent to an agreement made by the deed, and hence it is held that upon such recited agreement an action of covenant will lie." To the same effect is the case of Bealle's Adm'r v. Schoal's Ex'or, 1 Marshall, 475. It is clear, therefore, that the agreed purpose of the deed was to invest Mrs. Hancock with title to the property conveyed by it. In pursuance of that agreement she was invested with the right "to take the profits thereof to the use of herself and her heirs." This unlimited right to the profits conferred upon her heirs as well as herself, if nothing else appeared in the deed restricting it, would amount to a grant of the land itself, for, as said by Washburn, volume 3, section 23, page 662, a grant of rents, issued and profits of a tract of land is a grant of the land itself, and on page 695, that "a devise of the rents and profits is equivalent to a devise of the land itself;" and by Smith on Real and Personal Property, page 491: "A grant of the profits of land carries the land itself." In the case of Bowles v. Winchester, 13 Bush, 13, it is laid down that "the devise to the wife of the rents and profits for life, and then to her issue, was in substance a devise of the property itself." "There is no foundation for the distinction (18 B. Monroe, 329) attempted to be drawn between the land itself and its issues and profits" ( 4 Kent's Com., 6). The terms "her heirs" indicate an intention to create a fee, and are words of limitation which mark out the extent of the estate conveyed. But the use of the word "profits" and the inheritable term "heirs" are not the only provisions of the deed which evidence the purpose of conveying to her an absolute fee simple title.

She was also invested with the unrestricted power of alienation, the only condition to that power, if it be one, being that she should make a written requestee of the trustee to join her in the conveyance, and was given the right to the funds or proceeds arising from any sale she should make, "to be used, invested or disposed of as she may direct."

The trustee was excluded from control over the premises and exempted from any neglect. Thus she and her heirs were

granted the profits; she was invested with absolute power of alienation, and entitled to the proceeds to do with as she pleased, and in the event of her death during the lifetime of her husband she was expressly authorized to dispose of the whole estate in fee simple by testamentary devise. This double express power of alienation by deed and disposition by will is supplemented by the power, cast upon her by operation of law, to will the estate because of the separate quality impressed upon it by the deed.

The deed it so strictly guarded in its terms that her husband had no power of control to any extent, even over the rents and profits, and in every feature of it is to be seen the purpose of granting to her a fee simple estate, although these terms are not directly used. It has been often held that a devise, gift or grant generally or indefinitely, with power of disposition or absolute alienation, carries a fee unless the first taker is vested with a life estate only, and the power of disposition is annexed to the remainder (4 Kent, 319). In Jackson v. Robins, 16 Johnson, 588, the case was this: Lord Stirling, by his will, devised "all his real and personal estate whatsoever unto his wife Sarah to hold the same to her, her executors, administrators, and assigns; but in case of her death without giving, devising and bequeathing by will, or otherwise selling or assigning the said estate, or any part thereof, then he devised all such estate or all such parts thereof as should so remain unsold, undevised or unbequeathed unto his daughter, Catherine Duer."

This limitation over was declared void, Chancellor Kent saying the power conferred upon the wife "is an attribute of ownership and carries with it a fee"—that "the limitation over must be either as a remainder or as an executory devise, and it is impossible that it should be either. * * No remainder can be limited after an estate in fee." The deed does not confer a valid executory devise, because the absolute power of alienation in Mrs. Hancock is inconsistent with it, she having the power not only to use for life, but to defeat by alienation the subsequent estate that she was authorized to create by will. This court, in Caleb v. Field and others, 9 Dana, 347, held that a simple devise of an unrestricted power of disposition implied

an absolute gift in fee. In Jarman on Wills, note 1, page 669, it is said: "A right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift" (Smith v. Starr, 3 Wheat., 62). We might add authority after authority to this point, but it is unnecessary, for the doctrine is, in the very nature of things, based upon the inconsistency and impossibility of creating antagonistic estates in the same property, in one person, by the same deed.

If an absolute estate be granted by deed or the power to use, control and dispose of the estate be unlimited, which is equivalent to a positive grant of the estate itself, there can neither be an executory power, remainder over or other inconsistent estate superadded. In Ramsdell v. Ramsdell, 21 Maine, 288, the court say: It has become the settled rule of law that if the devisee or legatee have the right to dispose of the property at pleasure, the devise over is inoperative. So it was held in Ide v. Ide, 5 Mass., 500; Hall v. Robinson, 3 Jones Eq., 348; Bull v. Kingston, 1 Merivale, 314.

The limitation over was held void in much such a case as this in Jackson v. Bull, 10 Johnson's Reports, 20, where the testator gave the estate to his son Moses, his heirs and assigns, and "in case my said son should die without lawful issue" the property was limited to others named. The decision was based upon the ground that the limitation over or remainder was repugnant to an absolute control over the estate which the testator had given his son. In Melson v. Cooper, 4 Leigh (Va.), 488, the testator devised land to his son William and his heirs, and if he should die without a son and not sell the land it was to go to the testator's son George. The court held the devise gave William absolute power of sale, and whether he sold or not he took a fee simple, and the devise over to George was void.

In the recent case of Howard v. Carusi, the Supreme Court U. S. (Jan. 7, 1884) held where C. was given an estate with power of disposition, that a provision that so much of the estate as C. should not dispose of should at his death go to the testator's nieces was void, notwithstanding C. was requested not to diminish the estate further than might be necessary to

his comfortable support. In that case the authorities we have cited with others are referred to and followed.

The main question, therefore, is based upon the power of alienation conferred upon Mrs. Hancock. The attempt to limit the estate to her natural life was confined to the case of her survival of her husband, but in that event she still had the unrestricted power of alienation by any conveyance to any person she might choose to bargain with. So that her powers of control, sale, use of the proceeds, and of disposition by will renders it certain beyond reasonable doubt that she was not vested with a life estate only, if she died as she did, during the lifetime of her husband, and it is somewhat significant that in that event the limitation over is to the use of the children instead of heirs of her husband. This must have resulted from an intention to keep the property in the hands of those of her blood, they having one child at the time, and in pursuance of the purpose to convey the property to her according to the agreement set forth in the recitation. While the deed indicated the class of persons to whom the property was to go in default of conveyance or will by her, yet she, being clothed with absolute power of alienation, with the right to consume the proceeds, was consequently invested with a fee simple estate, which rendered the subsequent inconsistent provisions of the deed inoperative and void. Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Young & Trabue and W. P. D. Bush for appellants.

O. A. Wehle, F. Hagan, Kinney & Kinney, O'Neil and O. J. O. Brewster for appellee.

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## MANTLE, &c. v. BEAL.

(Filed May 24, 1884.)

**Limitation—Entry on land—Where husband and wife both execute a title bond to a tract of land owned by her, and the obligee in the bond entered claiming thereunder, Held—The wife will not be allowed after thirty years to set up her coverture as a defense. The entry having been made under her title, as well as that of the husband, thirty years is a complete bar, notwithstanding the coverture.**

Appeal from Ballard Common Pleas Court.

Opinion of the court by Judge Pryor.

This was an action of ejectment, the appellees claiming under the patent of one Leven Gallie. The patentee died more than fifty years before this action was instituted, leaving one child, named Alice, who married Edward Beal in the year 1830. They had several children, and the plaintiff (appellee) purchased all the interest of his brothers and sisters in the land, making him, so far as they were concerned, the real owner. Beal and his wife died in the year 1878, having first sold the land by title bond through an agent to the vendors of these appellants, or those under whom they claim.

Beal and wife sold as early as the year 1843, according to the testimony of some of the witnesses, and from the reply of the appellee to the answer of these appellants it appears that the sale was made in 1846. The appellants had entered on the land under their purchase and had possession of it under this title for not less than thirty-five years prior to the bringing of this action, the action having been instituted in the year 1880. The defense was the thirty-year statute of limitation, and we see no reason why it should not have prevailed.

If the sale was made in the year 1846, subsequent to the statute passed and approved in the month of February of that year, then the right of entry existed at any time on the part of the husband and wife, as the husband had no power to dispose of his wife's land by reason of that enactment, but it is contended in this case that the sale was made prior to the year 1846, and that the executory contract of the husband and wife, or by their agent, passed the life estate of the husband to the purchaser and deprived the wife of the right to enter until her husband's death; that then for the first time after the sale the cause of action accrued to the wife.

This rule would apply if the husband had sold his curtesy only or would be applicable under the statute of fifteen years, but under the thirty-year statute, where there is a sale executory or executed by both husband and wife, or an agent for them, and the purchaser enters claiming under his purchase, the feme will not be allowed, after the lapse of thirty years, to say that the disability of coverture prevented her from making an executory contract. After such a lapse of time her cover-

ture is no protection, and the entry having been made under her title as well as that of the husband, the thirty-year statute is a complete bar to the recovery. In the case of Conner and Wife v. Downer, &c., 4 Bush, 681, the entry and possession was against the claim of the wife and the thirty years was held to be a bar to the recovery, while if it had been less than thirty years the disability would have protected the feme if brought within proper time after the removal of the disability.

In Medlock v. Suter, 80 Ky., 101, there was a parol sale by the husband and wife, and an entry and possession under it for thirty years, and this court held that it barred the recovery, upon the ground that it was an entry under the title of both, and that the heirs of the feme would not be allowed to say that it was void as to her because she was laboring under the disability of coverture. It was held in that case that the legislative policy was to quiet titles, notwithstanding disabilities after thirty years' adverse possession, or, in other words, will not permit disabilities to prevent the running of the thirty years' statute.

It is argued that the sale in the case of Medlock v. Suter, supra, was by parol in 1842, and that being in parol nothing passed from either husband or wife, and, therefore, the right of entry existed, but in this case the right did not exist because the title of the husband passed. This would be holding that if the sale was by parol on the part of the husband and wife the statute would run, but if in writing by the same parties it would not run; that is, the higher the grade of the evidence as to the contract the less virtue there is in the thirty years' statute. Such should not be the construction of a statute intended to perfect and quiet titles after a continued possession under a claim of ownership for the period of thirty years. If the husband had sold his curtesy, or the life tenant his interest only, no cause of action accrues to those in remainder until the termination of the life estate, and then the statute begins to run and not before. But when the life tenant and the owner of the fee both unite in the sale and undertake to pass the fee a possession by the purchaser under his purchase for thirty years will give him title as against both the grantors, and

neither will be allowed to rely on the disability of infancy or coverture to oust the purchaser. It is not so much a question as to when the cause of action accrued, but a question as to whether title passed after the thirty years, and there is no doubt but it would have passed but for the disability. Suppose the married woman had sold without uniting her husband, the title would have passed or become perfect after the claim and possession of thirty years under it, as the disability after such a lapse of time affords no protection. In this case, as said in Medlock v. Suter supra, there was no purchase of the particular estate from the husband, but the purchase was made of both the husband and wife of the absolute estate, or the sale made by the agent for both parties, and the entry made and possession taken under it, and now, after the lapse of thirty years, it is insisted that the entry under the wife was void because her disability prevented her from making the contract. Under the thirty years' statute the fact that the vendor was a married woman can make no difference, and whether the entry and possession was under an executory or an executed contract is equally immaterial.

This case illustrates the wisdom of the construction adopted in Medlock v. Suter. Here the parties have entered upon the land in controversy, under the title of both husband and wife, and have been in the undisturbed possession for at least thirty-five years; have made improvements; cleared up the lands, and when near a half a century has elapsed they are told that a remote vendor was a married woman, and her contract being void they must surrender their homes. "The period in which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims by reason of any death. or the existence or continuance of any disability whatever" (Section 4, article 1, chapter 71, General Statutes). In the case of Bransom v. Thompson, 5 Ky. Law Rep., 359, appealed from the Lyon Circuit Court, it is said: "Where there is a sale and the party could have sold, but for the disability of infancy or coverture, the thirty years' statute runs because the disability under that statute affords no protection.

This is not the rule applicable to any other statute, and the thirty years' statute was enacted so as to prevent parties from recovering for no other reason than that they were infants or feme coverts."

And in Medlock v. Suter, supra, the court said: "There is a point at which no right of action exists for the recovery of land, or rather where the action is barred, and this period is fixed at thirty years, although the party making the sale was laboring under a disability at the time of making the same."

In this case we understand from the testimony of the appellee that the sale was made by the husband and wife or the agent of the husband and wife and for both; if so the thirty-year statute should have prevented the recovery. The judgment below is, therefore, reversed and cause remanded, with directions to award a new trial and for proceedings consistent with this opinion.

Z. W. Bugg, White & Reeves and Bigger & Reid for appellants.

Nichols & Hawes for appellee.

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## PORSCHET v. PORSCHET.

(Filed May 20, 1884.)

**Testamentary capacity—Undue influence—The fact that the testator devised his entire estate, to the exclusion of his lawful heirs, to a woman with whom he had been co-habiting as his wife, but who was in fact the wife of another man, is not sufficient of itself to invalidate the will or to establish undue influence, though it may be considered as evidence of such influence along with other facts.**

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

The will in controversy was admitted to probate by the county court as the last will of John L. Porschet, and on an appeal to the circuit court the same result followed, and from the judgment in that court the brother of the testator, who is the only party contesting the validity of that paper, has appealed to this court.

The testimony in the case leaves no doubt as to the mental capacity of the testator to execute such a paper, and the ground

relied on for defeating the probate is the alleged undue influence of the devisee in procuring the devise in her favor.

The will was executed some three years prior to the testator's death in the absence of the sole devisee, and was written by an attorney who knew the testator well, and this legal adviser, together with his family physician as well as others, testify that the devisor had full possession of his mental faculties at the date of the paper and long after, the physician testifying that he retained full possession of his mental power up to the day of his death.

When the will had been executed, the attorney writing it, sealed it up in a large envelope, and handed it to the devisor and after his death it was found sealed in the same envelope, and opened for the first time in the office of the county judge.

The testator talked to his attorney before and after he made the will as to his property, and he at no time expressed a desire to make any other disposition of his estate than as found in the will in question.

The devisor and the devisee were both Germans, advanced in years, and had lived together as man and wife for eight or ten years prior to the death of the testator. The marriage ceremony was solemnized in the usual form, and the testator no doubt believed at the time that there was no impediment to the marriage, but it was developed that Mrs. Porschet had married one Beck, from whom she had separated, and several years thereafter married the testator, without having obtained a divorce from Beck. There is proof conducing to show that the testator ascertained after the marriage that his supposed wife had a living husband at the time of his marriage with her; and, on the other hand, it is attempted to be shown that this fact was concealed from the testator, and in making his will that he disposed of his property under the belief that the appellee was his lawful wife. She swears that her family knew this obstacle to the marriage, and that her son-in-law agreed to obtain a divorce for her for fifty dollars, and, after handing him the money, he announced in a few days thereafter that the divorce was obtained and the marriage could take place. In this statement she is confirmed by her son, and if she believed that the marriage was legal it must have proceeded from this

undertaking on the part of her son-in-law to obtain the divorce, and her belief in the truth of his statement that it had been obtained. Both her daughter and son-in-law, testify against her and contradict her testimony on this point, but the jury seem to have credited the old lady and rejected the testimony of the son-in-law and daughter, and with their hostility towards the mother and the unnatural position occupied by them in the case the jury might well have concluded that the refusal of the appellee to give her daughter a part of the property caused the interest they have manifested for the success of the contestant.

While the evidence is conclusive as to mental capacity, there is some evidence from which might be inferred the existence of undue influence on the part of the appellant, and it may be proper, therefore, to notice the instructions of which the appellant complains.

The third instruction, given at the instance of the appellee, is in substance "that the fact of co-habitation between appellee and the testator, the appellee having a living husband, is not of itself sufficient to authorize a verdict against the will unless the fact be accompanied by undue influence over the testator by the devisee, but the jury may consider that fact, together with all the facts in evidence, in order to ascertain whether or not such undue influence was exercised."

This instruction embodies the law of the case unless the unlawful relation existing between the testator and the devisee is of itself sufficient to establish undue influence.

The influence arising from such an unlawful relation must be exercised over the mind of the testator in such a manner as to invalidate the will, and if not improperly exerted or the testator left to dispose of his property according to his own wish and desire, we see no reason for disregarding his will from the mere fact that he has seen proper to give his estate to one who has sustained to him the relation of wife when in fact the lawful wife of another.

A distinction may, and doubtless should, exist between the ordinary influence of a lawful relation and that of an unlawful relation. The exercise of an influence that must naturally exist, by reason of the lawful relation, would not be improper,

while the exercise of a like influence by a stranger or one occupying an unlawful relation would be sufficient to destroy the will. This undue influence, however, must be exercised to render the will invalid, and where there is no constraint operating on the mind of the testator at the time of the testamentary act, and he disposes of his property in accordance with a fixed purpose of his own, the devise will be upheld, although it may be made to a stranger or to one the testator was under no natural, legal or moral obligation to make provision for. If the offspring of a sound and disposing mind and memory, the mere fact that the testator has given his estate by the will to one with whom he has lived with for years as his wife, in preference to his brothers and sisters, will not authorize the court to say to the jury that the law presumes the existence of undue influence, and in the absence of any proof to the contrary they must find against the will. The fact of the unlawful relation must go to the jury in connection with the other facts and circumstances proven in order that they may determine the question of undue influence.

In the case of Rudy v. Ulrick, 69 Pa. State, Sharswood, Judge, delivering the opinion of the court, said: "In an issue of devisavit vel non, on the allegation of undue influence by the mother of an illegitimate child, the unlawful cohabitation of the mother with the testator is not of itself sufficient evidence from which a jury could infer undue influence."

In Main v. Ryder, 84 Pa., 217, Main had abandoned his lawful wife and children, and lived for many years in adultery with a woman alluded to in the will as his wife. He had by this woman several children, and made her and the children devisees of a large portion of his estate. The court, by Agnew, Justice, said: "These circumstances do not create a presumption that the will was executed under improper influence, and while the illicit relation should be considered in determining the question of undue influence, the effect of such influence is a question of fact for a jury."

In the case of Wainright's appeal, the same court in a case where the testator and the residuary legatee lived together unlawfully for several years, it was held that the circumstances

of the case were not sufficient to justify a jury in finding against the will.

Our attention has been called to no case taking a different view of the question. The case of Dean v. Meyley, 41 Pa., decided that it was a question of fact for the jury, although the judge delivering the opinion said he thought the law in such a case presumed undue influence.

In Monroe v. Basday, 17 Ohio St., it was held that a will produced by influences springing from an unlawful relation between the legatee and the testator did not make the will void unless undue influences were exerted in restraint of the will of the testator, and prevented him from disposing of his property in accordance with his own wishes. See also Dickie v. Cattie, 42 Ill., where the devisee had improper intercourse with the testator, it was held that, however immoral the relation might have been, it was not sufficient to invalidate a will in favor of the wrongdoer, if no improper influences are shown to have been exerted to induce the will."

The law will not indulge in a presumption against the act of a party in such a case as this, but the entire question of undue influences should be left to the jury, and they must determine whether such influences were or not improperly exerted over the testator when making his will as prevented him from disposing of his estate in accordance with his own judgment, and in the absence of an inference over him by others as restrains him from its exercise the will must be held valid.

The second instruction, in defining undue influence, tells the jury that it must be such an influence as "substituted for the will of the testator the will of some one else." While this, as an abstract proposition, may be correct, still the question at last is, was the influence over the testator so great as to prevent him from disposing of his property as he wished, or such as constrained him to make provisions in his will which he did not intend to make and would have refused to make if his will had not been subordinated to that of another?

We can not well see how the addenda to the instruction could have misled the jury from the facts of this record, as the evidence of undue influence is scarcely to be found, and the in-

structions given for the contestant will explain so as to enable the jury to know what was intended by the instruction given, not that the entire will by the devisee must have been subordinated to that of the principal devisee, but that she had such an influence over him as destroyed his free agency in the attempt to dispose of his estate.

In the instructions given for the contestant the jury was told that if the devisor believed that the relation of husband and wife existed between him and the appellee, and that she held the influence she acquired over him by reason of such a relation in procuring the will, and that in the disposition of his estate he would have acted differently if left to the exercise of his own judgment and discretion, they must find against the will.

The jury was further told that if the paper purporting to be the will of the testator was obtained from him by some mode which could not be resisted by him, and destroyed his free agency and constrained him to do that which if left to his own judgment he would not have done in disposing of his estate, they must find against the will.

And again: If the testator, at the time he executed the paper, believed that the appellee was his wife and was induced so to believe by the appellee, and willed to her his property alone upon the consideration that she was his wife, and would not have done so if he had not so believed, and they further believe that she was the wife of Beck, they must find for the contestant and against the will.

And again: The jury are told that an influence in procuring a will which may be lawful when exercised by a wife may be objectionable and improper if exercised by a woman living in unlawful intercourse with the testator, and if the jury believe that at the date of the will the appellee had a former husband living from whom she had not been divorced, and that she used the influence acquired over the testator by reason of that unlawful intercourse in procuring the execution of the paper, and constrained him against his will to execute it when he would not have done it if left to his own judgment, they must find against the will. It was conceded on the trial that no divorce had been obtained from Beck by the appellee, and the question of undue influence, or what might have constituted such a re-

strain upon the mind of the testator as destroyed his free agency, was presented in every phase to the jury at the instance of the contestant, and certainly in as favorable a light as he could have desired, and, therefore, the jury could not have been misled by the general instruction given on the subject at the instance of the propounder of the paper.

The devisee was a competent witness, and certainly so when her conduct and admissions were relied on to destroy the validity of the instrument under which she claimed (Flood v. Pragoff, 79 Ky., 607). There are other errors assigned not necessary to be considered, as, in our opinion, the judgment below should be affirmed.

Oliver W. Root, A. W. Stossmeister, E. W. Hawkins and W. Lindsay for appellant.

Nelson & Washington for appellee.

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## SUPERIOR COURT.

### CROUCH'S ADM'R v. CROUCH, &c.

(Filed April 23, 1884.)

**Limitation—New promise—A new promise or acknowledgment of a debt in order to prevent the running of the statute of limitations must be made either to the creditor or to his authorized agent; and the rule is the same whether the bar had already become complete or was still incomplete at the time of making the new promise.**

Appeal from Washington Circuit Court.

Opinion of the court by Judge Richards.

It was formerly the rule, both in this country and in England, that an acknowledgment of a debt made to a stranger was as effectual to take the case out of the statute of limitation as if made to the creditor himself. Limitation under the common law was nothing more than the presumption of payment, and statutes of limitations were at first regarded in the same light. To rebut this presumption the acknowledgment was sufficient, no matter to whom made. But such acts are now regarded everywhere as statutes of repose. Their usual language, as in this State, is that the action shall be commenced within a

fixed period or not at all. Some modern courts have expressed the opinion that to allow the operation of the statute as a complete bar to be defeated at all by a new promise was to be regretted as an unwise departure from the strict letter of the statute; and the tendency everywhere is to limit the evils resulting from this departure by more rigid rules in regard to the character of the promise itself. Some States have sought a remedy through the legislative department, and have caused statutes to be enacted requiring a new contract in writing between the parties. But even in most States where no such statute exists "it may now be said that the theory of acknowledgment is settled, as to simple contracts, in the principle that there is required either an express promise to pay the debt, or an absolute admission of indebtedness from which a promise to pay may naturally be inferred" (Wood on Limitations, section 68). And it may also be considered as the settled law of this country, as recognized in Trousdale v. Anderson, 9 Bush, 276, that if the debt is already barred the new promise must be made to the creditor or his authorized agent.

But it is insisted in the case at bar that the reason for applying this rule does not exist, and the rule is, therefore, not applicable to a case where the promise is made before the bar is complete. It is true there is a distinction in some respects between the effect of the promise made before the bar and one made after. In the former case the action must still be upon the old contract; in the latter upon the new promise. The effect of the promise made before the bar is to cut off and exclude the time that had theretofore elapsed; but where the promise is made after the bar, the period of limitation must depend alone upon the character of the new promise. But is there anything in these distinctions which obviates the necessity of having an acknowledgment to the creditor or his authorized agent?

Why is it that the acknowledgment made before the bar eliminates the time already elapsed? In most cases it is said because the debtor makes a new promise (Wood on Lim., section 79). But to validate a promise there must be a promisor and promisee—a person on both sides competent and authorized to contract. But in Kentucky it has been held that "the party making the acknowledgment waives past time, and

is estopped from pleading it" (Hopkins v. Stout, 6 Bush, 379). But a waiver, before it can amount to an estoppel, must be made to the party in interest, or his authorized agent. This is a just rule so far as applied to the question at bar. If the acknowledgment is made to the creditor, he may well say, "my debtor has, by his statement to me, extended the time within which I can commence my action, and I will, therefore, not sue for the present." In such cases the debtor can not complain if the law of estoppel is applied to him. But suppose he has never said a word to the creditor or his authorized agent, could he not justly claim that the plaintiff had no right to rely upon statements made to a third party for an enlargement of his, the defendant's, liability?

So it has been said: "The acknowledgment or promise must not only be made by a person legally competent to contract, but must also be made to the creditor himself, or some person duly authorized to act for him in that regard," and no distinction in this respect is made between acknowledgments before and after the bar. (Wood on Lim., section 79.)

In Carroll v. Forsyth, 69 Ills., 128, the acknowledgment was made before the bar, yet the court said: "In addition to the indefinite and ambiguous character of the answer then made by Carroll, Baldwin does not seem to have been acting as the agent of appellee, or in any way interested in this debt, and, therefore, even if an express declaration had been made to him by Carroll that he owed appellee $5,000, and intended to pay it, it would not have been sufficient to have relieved the case from the bar created by the statute."

In McKenney v. Snyder, 78 Penn. St., 497, it was claimed, as here, that the debt never was barred because of repeated promises, but the court held them to be unavailable, because "a promise, to take the case out of the statute, must be made to the plaintiff or his agent."

So in Niblock v. Goodman, 67 Ind., 183, the court said: "An acknowledgment or promise, whenever and wherever applicable, will not be available in any case, as it seems to us, to take a suit, otherwise barred by the statute of limitation, without

the operation of the statute, when such acknowledgment or promise has not been made to the creditor or to his agent."

And Judge Story lays down the rule to be, without qualification, "an acknowledgment of a debt or judgment, to take the case out of the statute of limitation, or bar by lapse of time, must be made, not to a mere stranger, but to the creditor, or some one acting for him, and upon which the creditor is to act or confide." (Story's Eq., section 1521 [a]).

In this case it is not claimed the new promise was to the creditor or his agent. The judgment is, therefore, reversed and the cause remanded for a judgment consistent with this opinion.

Clements, Selecman & Bell for appellants.

W. C. McCord for appellee.

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## HOWARD v. CORNELISON.

(Filed February 27, 1884.)

**Attorney—Contract—Public policy—A and B sue C on a note and D, who is jointly liable with C, offers to pay $500 in settlement of the suit; plaintiffs accept the offer, but, in order to defraud their attaching creditors, take a note payable not to themselves but to Cornelison, defendant's attorney, who on his part signs a writing in which he falsely states that the $500 is paid him on account of fees due him, Held—The law will not enforce a contact (such as this) between plaintiffs and the attorney of defendant, by which the former's creditors are fraudulently deprived of the lien they have acquired under attachments.**

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Richards.

The appellee sued H. C. Howard upon a promissory note for $500. The defendant plead no consideration. The plaintiff, not contenting himself with a denial of the allegations of the answer, proceeded to set out what he understood to be the facts attending the execution of the note. From these we find that a suit was pending in Bourbon county in which P. A. Howard and Josiah Anderson, for the use of P. A. Howard, were plaintiffs, and M. M. Clay defendant; that Clay employed the plaintiff Cornelison as his attorney to defend said action; that while he was so engaged H. C. Howard, who was originally liable upon the debt upon which Clay was being sued, came to him, Cornelison, in company with Anderson, and said that he,

H. C. Howard, had agreed to give to Anderson, or to anyone he might designate, his note for $500. The necessary inference is, although not definitely stated, that this note was for the purpose of settling the Bourbon county suit. The reply further states that "when the defendant was about to execute said note to said Anderson, said Anderson directed said Howard to execute the same to said plaintiff, as he, Anderson, was owing large fees to plaintiff for legal services;" that although the above were the true circumstances under which the note was executed, he admits that at the same time he gave H. C. Howard the following writing:

"Whereas, H. C. Howard has this day executed to me his note of even date herewith for $500, due twelve months after date with ten per cent. interest thereon from this date. The condition of said note is as follows: Howard has employed me to defend the suit pending in the Bourbon Circuit Court of P. A. Howard v. M. M. Clay, upon an obligation which purports to have been assigned to P. A. Howard by Josiah Anderson, and the note above named is for my fee in said suit, and I agree if I do not defeat said claim and prevent a recovery against M. M. Clay to surrender the note and make no charge for my services."

In explanation of why a false consideration was stated in this writing, the reply alleges that the creditors of P. A. Howard had attached whatever might be due on the claim sued upon in the Bourbon Circuit Court, and "if it appeared that the plaintiff in the Bourbon suit got anything by reason of his said suit the attaching creditors of Howard might be entitled to it, and plaintiff could not state the real consideration of the note, but stated it was given for a fee, when such was not the real fact in the case." We further learn from this reply that although the Bourbon suit was being prosecuted by P. A. Howard and Josiah Anderson for the use of the former, the latter was the real owner of the claim.

According to appellee's own pleading, when analzyed, we then have this state of facts:

1st. Anderson, for some reason not disclosed, is seeking to recover in the Bourbon suit his claim from Clay under the cover of the name of a third party.

2d. That Cornelison was employed as the attorney for Clay to defend said action.

3d. That H. C. Howard, who was originally liable for the debt upon which Clay was sued, and Anderson, the real owner of said debt, came together in the office of Cornelison, Clay's attorney, for a settlement.

4th. H. C. Howard was to execute his note for $500, but it could not be given P. A. Howard because his creditors had attached the claim; it could not be given to Anderson because P. A. Howard's creditors would still get it, as Anderson was prosecuting the suit for the use of P. A. Howard.

5th. Therefore, the attorney for Clay enters into a conspiracy with these parties to defeat the creditors of P. A. Howard.

6th. To carry out this conspiracy Clay's attorney agrees that the note may be executed to him, and that he will give Anderson credit therefor on his account for fees owing him.

7th. That to put it out of the power of said creditors to detect the fraud that was being practiced upon them the attorney signs a writing by which he falsely states that the note was given him for professional services to be rendered by him to the maker, H. C. Howard.

If we had any doubt about this being the proper interpretation to be given to this pleading it would be removed by reading the plaintiff's testimony, where he says, among other things, that after the termination of the litigation in Bourbon county he collected $250 as a fee from Clay, but credited it to his adversary, P. A. Howard, at the request of Anderson; and long after that, which was in July, 1876, he made an arrangement with Anderson by which he was to have the benefit of the $500 note, which had been executed to him, Cornelison, on January 9, 1875.

If this had not been in fact a conspiracy to defraud the creditors of P. A. Howard, there could have been no reason why the Bourbon suit should not have been dismissed so soon as the settlement was agreed upon between the real parties in interest.

And yet it seems to have been prosecuted for over a year thereafter, during which time Cornelison goes through the farce of taking his own deposition and that of Anderson to

prove that the claim sued on was without foundation, and obtains a judgment to that effect.

Public policy forbids, and the law will not countenance, a combination by which the defendant's attorney can reap any profit from a contract with the plaintiffs, by which the latter's creditors are fraudulently deprived of the lien they have acquired under an attachment of their debtor's interest in the claim sued upon.

It is unnecessary for us to discuss any of the other phases of this case. Under the circumstances a general demurrer should have been sustained to the reply, but as none was filed the court, instead of instructing the jury peremptorily for the plaintiff, should have given such an instruction for the defendant.

The ninth assignment is sufficiently definite to require the consideration of this error. The judgment is, therefore, reversed and the cause remanded for a new trial and for further proceedings consistent with this opinion.

A. T. Wood and W. H. Holt for appellant.

H. L. Stone for appellee.

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Response to petition for rehearing by Judge Bowden.

(Filed May 7, 1884.)

1. Consideration—Pleading—The law presumes that a note was executed upon a sufficient consideration, and defendant must overcome this presumption by sufficient evidence, yet if plaintiff unnecessarily allege the consideration in his petition or reply the burden is on him to prove it as alleged; second, and if he sets up an illegal consideration a general demurrer will be sustained to his pleading.

2. Practice—Assignment of errors—Where the assignment of errors and grounds for new trial designate the instructions refused defendants by numbers 1 and 5, but the bill of exceptions designates them by letters A, B, etc., Held—This is a mere incorrect description and does not affect the assignment as the instructions can be otherwise sufficiently identified.

Cornelison's petition was in the common form on a promissory note dated January 9, 1875, payable to Cornelison at twelve months, for $500.

Howard's answer consisted of several paragraphs. The first was a plea of no consideration, in the common form. The

second alleged that when the note was executed the defendant owed the plaintiff nothing; that "one P. A. Howard, as assignee of J. Anderson, had brought suit in his own name and that of said Anderson for said Howard's use in the Bourbon Circuit Court against M. M. Clay upon a claim for which defendant was not liable; and on January 9, 1875, plaintiff came to defendant and professed to be acting for said Clay and Howard, and told defendant that one R. Reid and Samuels and Jordan had attached said claim for a debt said Reid and Samuels and Jordan held on said Howard, and that he (plaintiff) had made or could make an arrangement by which said suit would be defeated and cost said Clay nothing, and also defeat said Reid, &c., as to their attachment, provided defendant would execute his note to plaintiff for $500 as plaintiff's fee in said suit; but that he (plaintiff) could not tell him (defendant) how it was to be done, and that it must be kept secret even as to said Clay; and thereupon defendant executed the note sued on for the fee of plaintiff in said case, as said Clay was defendant's friend and relation, and the sole consideration of said note was plaintiff's fee in said case."

The defendant here plainly avers that the note sued on was executed to the plaintiff as an attorney for services to be rendered in the Bourbon suit by which that suit should be defeated and cost Clay nothing, and that the services should "also defeat said Reid, &c., as to their attachments." It alleges that the plaintiff proposes to accomplish both of these things, and that it was this undertaking to defeat the Bourbon plaintiffs "and also" the attaching creditors which constituted the sole consideration for the note.

Obviously, however, it would have been a perfectly legitimate undertaking if the Bourbon suit was to be defeated upon its merits, or because it had none; and upon such defeat it is also clear that the attaching creditors would have suffered no wrong, inasmuch as such defeat would have proved that Clay owed P. A. Howard nothing, and that, therefore, there was nothing to be attached. On the other hand it seems to be equally clear that if the undertaking was to defeat the Bourbon suit, apparently but not really, and in such manner that the record would show a defeat, while in fact the plaintiffs would

bear off the substantial fruits of victory, the attaching creditors would suffer if the plan should be successfully executed. But the answer does not allege that the "arrangement" which the plaintiiff said he had made or could make contemplated such methods.

The plaintiff filed a reply in which, after traversing the averments of the answer, he said: "Plaintiff was the attorney of M. M. Clay, and of him alone, in the Bourbon court. P. A. Howard, as the assignee of Josiah Anderson, had sued Clay in that court for some $1,200 or $1,500. Anderson was perhaps the real owner of said claim, although it was brought by Howard. Anderson and defendant were both interested in the suit, and had divers talks about how it could be compromsied. Howard's creditors had attached whatever judgment he might obtain against Clay, and under these circumstances Clay agreed with this plaintiff that if he would defend that suit successfully and prevent any judgment against him he would give him a fee of $250; and plaintiff did go on and defend that suit successfully and did get the said fee of $250 from Clay. By reason of defendant Howard's being interested in the result of the suit in Bourbon, and originally liable for the debt sued on therein, he agreed with Anderson that he would give to him, or anyone he might say, his note for $500; but to this agreement this plaintiff was no party. And when the defendant was about to execute said note to said Anderson said Anderson directed Howard to execute the same to this plaintiff, as he (Anderson) was owing large fees to plaintiff for legal services. But said defendant claimed that said note was not to be paid if said Anderson or P. A. Howard prosecuted their suit in Bourbon to a judgment against Clay, and demanded a writing showing that if plaintiff did not defeat said claim and prevent a recovery against M. M. Clay he was to surrender the note; and plaintiff did execute a writing to that effect; but at said Anderson's and defendant's request plaintiff did not state the real consideration of said note in that writing, because, if it appeared that the plaintiff in the Bourbon suit got anything by reason of his said suit, the attaching creditors of Howard might be entitled to it, and plaintiff could not state the real

consideration of the note, but stated it was given for a fee, when such was not the real fact in the case."

The defendant demurred to so much of the reply as has been quoted, and the court overruled the demurrer.

It is the duty of the court to decide what a pleading actually avers, as well as the legal value of the averment. The question first arising is, what does the reply aver? Then, what is the legal value of that averment?

As a preliminary, but not wholly unimportant, matter it may be observed that the plaintiff does not allege that Anderson directed the defendant to execute the note to him for his own use, or that, by reason of its being made payable to him or of any other fact, he was the beneficial owner. All he says is that "Anderson directed Howard to execute the same to this plaintiff as he (Anderson) was owing large fees to plaintiff for legal services." This direction was given when Howard "was about to execute said note to said Anderson." The execution of it to the plaintiff was not because he was entitled to the money, but merely because Anderson so directed. It is not averred that this was done in payment of those large fees, nor as a security for them, nor that they were so large as to require all of the proceeds to pay them. As the reply discloses the fact that none of the money was due to plaintiff, but that the note was executed to him at the request of the party to whom it was going, and as it does not aver that there was an agreement along with that direction, that he should either be the beneficial owner of the note or entitled to all of the proceeds, it must be regarded as conceding that, either as to all or part of it, the note was executed to the plaintiff as trustee in secret trust for the plaintiffs in the Bourbon suit. Nor is any subsequent transaction alleged whereby he became the beneficial owner. The interpretation of the reply most favorable to the plaintiff is that to the undisclosed extent of Anderson's indebtedness the note was ordered to be executed to him as collateral security; but the more natural interpretation is that Anderson selected the plaintiff, not to secure him, but because his indebtedness to the plaintiff would be a security for the note itself, and reduce the risk to that extent. That the note was executed to plaintiff as trustee in secret trust, either for all of

the proceeds to be thereafter accounted for or for the excess over his claim on Anderson, results from any view we have been able to take.

For what purpose, then, as alleged in the reply, was this note executed at all? And why was it executed to the plaintiff in secret trust?

The reply undertakes to answer both of these questions. While it does not in terms aver that the defendant agreed to pay the sum of $500 to the plaintiffs in the Bourbon suit as a compromise of the matters it involved, that is the necessary inference, as otherwise there would be nothing alleged as a consideration for the note. The plaintiff avers that Anderson and Howard had sued Clay; that certain of Howard's creditors had attached whatever judgment he might obtain against Clay, and that "under these circumstances Clay agreed with this plaintiff that if he would defend that suit successfully and prevent any judgment against him he would give him a fee of $250. The fact that attachment liens existed, and that Clay had thereby become answerable to the attaching creditors according to the actual fact in regard to his indebtedness to P. A. Howard, and that he could not defeat those creditors by an open arrangement between himself and P. A. Howard by paying him an agreed sum in compromise or in consideration that he would dismiss his action, constituted the "circumstances." In order to ascertain the true meaning of the reply we must keep these circumstances in mind. The settlement of the Bourbon suit no longer rested on the mere will of the parties to it. The creditors of P. A. Howard had attached what Clay owed him. The law had laid one hand upon that debt and one upon Clay, forbidding him to pay it to P. A. Howard. If in defiance of the law's command he paid it to Howard he would be still liable to the creditors. A compromise with Howard, whereby he would escape with part of what Clay owed him, would not protect Clay from the creditors. Considering these complications it is not difficult to fix the meaning of the reply when it says that Anderson and defendant "had divers talks about how it could be compromised." The difficulty was not in regard to the terms of settlement, as how much money and on what time, but it related to the man-

ner in which the compromise could be made so as to protect Clay from the attaching creditors, and at the same time enable P. A. Howard to get the money from under the attachment liens. The mooted and perplexing question was "How it could be compromised."

It is too plain to require argument to show that the reply couples these consultations about how it could be done with the manner in which it was done. The meaning could not be more evident if it had been distinctly averred that Howard was willing to pay $500 to relieve Clay from a liability of $1,-200 to $1,500; that Anderson and P. A. Howard were willing to accept that sum, provided a plan could be devised whereby they should get the money and the attaching creditors should be defeated; and that the plan pursued was adopted for that purpose. What was that plan?

The defendant agreed with Anderson "that he would give to him, or to anyone he might say, his note for $500." If this was a mere compromise of the matters in the Bourbon suit, without any ulterior object, why the suggestion that the note should be given to a stranger? It was also agreed that "the note was not to be paid if said Anderson or P. A. Howard prosecuted their suit in Bourbon to a judgment against Clay;" and, therefore, the plaintiff in this action, to whom as trustee the note was executed, in order to furnish the defendant evidence of the contract, gave him a writing stipulating that the note was not to be paid unless he (the plaintiff) defeated their claim and prevented a recovery against Clay. The plan, therefore, was not that the Bourbon plaintiffs should dismiss their suit as settled, but that their trustee should defeat them and should prevent their recovery. How? Because on the merits it ought to be or could be defeated? If Anderson had thus conceded that there was no justice in the claim against Clay, it is incredible that the defendant would have given his note for $500 in order to compromise a claim thus admitted to have no existence; and it is equally incredible that Clay's attorney would have taken the note payable to himself in order to settle a claim which he then knew did not exist. These allegations can not be regarded as meaning that the Bourbon suit was to be defended on its merits, and was to be lost because it had

none. They mean that that suit was to be so managed by the plaintiff that the record would show that Howard and Anderson had no claim on Clay, and thus defeat the attaching creditors. They mean that it was stipulated by the plaintiff in behalf of Anderson and Howard, that by active co-operation or by passive sufferance their case should be so managed as to be lost.

If there could remain any doubt that this is the true meaning of the reply it ought to be removed by the allegation that "the plaintiff did not state the real consideration of said note in that writing because, if it appears that the plaintiff in the Bourbon suit got anything by reason of his said suit the attaching creditors of Howard might be entitled to it, and the plaintiff could not state the real consideration of the note." What was the consideration of the note as stated in the reply? It was that there should be such management of the Bourbon suit that it should be lost; the claim was to be defeated; a recovery was to be prevented; and this was to be done so as to leave no trace of the purpose for which it was to be done; "because if it appeared" the creditors "might be entitled" to the money to be paid. Doubtless the plaintiff was strictly correct in saying he "could not state the real consideration," if it was feared that the paper to be given to the defendant might fall into the hands of the creditors, or if it was thought that in any contingency it might be desirable to show it to them. So secret was the nature of the real consideration, and so conspicuously clear to them was the value of that secrecy, they thought it imprudent to trust it to even their private papers. Can it be supposed they meant that the Bourbon records should reveal what those papers concealed?

The rule constantly applied is that if a pleading may have more than one meaning that which is least favorable to the pleader shall be taken. But it does not seem to us necessary to invoke that rule in this case. We think that no other meaning can be fairly extracted from the affirmative part of the reply which we have quoted than that the defendant gave the note sued on in consideration that the Bourbon suit should be so managed as to defeat a recovery on that action without regard to its merits, and also to defeat the attaching creditors, not only in the interest of Clay, but in that of Anderson and

Howard, who were thereby to evade the process of the court by escaping with a fund which had been attached.

Merely for the purpose of confirming the interpretation we have given this reply we will refer to the evidence introduced by the plaintiff in support of it.

The plaintiff introduced Josiah Anderson, who testified "that after the suit was brought by P. A. Howard against M. M. Clay in the Bourbon Circuit Court, and after Reid, Samuels and Jordan had attached what might be coming from or recovered from M. M. Clay himself, H. C. Howard and P. A. Howard had several talks about it in Mt. Sterling, Ky., and all made an agreement with H. C. Howard that M. M. Clay was to pay $250 and H. C. Howard was to execute his note for $500, making $750 as a compromise and settlement of said suit; and that he did not know how the matter could be fixed up, but that he went and told J. J. Cornelison (plaintiff) what was the arrangement, and for him to fix it up. * * This arrangement was made to get the money out of it. I thought we had better get $750 than nothing. We advised with Mr. Cornelison at the time how to do it, and about the matter all the time, and told him he knew how the matter could be arranged. I did not know how it could be done. * * After P. A. Howard, H. C. Howard and myself had agreed on what we wanted to do we did not know how to consummate it, and we went to J. J. Cornelison and advised with him how to do it and how to carry it out. * * The claim on Clay I assigned Howard was a just one. I gave the deposition now before me in the suit of P. A. Howard v. M. M. Clay in the Bourbon court, and did so after the arrangement had been made to settle said suit, as I did not owe Reid anything, and I wanted the money myself and did not want Reid to have it. * * I told Cornelison to take the note payable to himself, as I was owing him large fees for legal services."

This evidence agrees exactly with the reply as we understand it. The claim for which Clay was sued was a just one; Howard's creditors had attached; he, Anderson and defendant agreed on the sum to be paid and the credit to be given, but did not know by what skillfully secret means the other essential part of their agreement could be consummated so as to protect Clay from the attaching creditors and to secure to Anderson and Howard the money to be paid, thus defeating those

creditors. It seems to us that the averments of the reply are not less explicit than the declaration of the witness, that the "arrangement" was made to keep Reid from getting the money, for which purpose nearly half of the debt was given up.

The testimony given by Anderson has been quoted as more succinct than that given by the plaintiff, but it is the same as if he had given it. It was his version told to the jury by his witness, and which, though recalled to dispute another statement made by Anderson, he did not controvert. That disputed statement sheds a lateral light on this matter. The plaintiff had testified that Clay was to pay him a fee of $250 for the successful defense of the suit, and that soon after it was ended, which occurred July 3, 1876, Clay paid that fee, and that "at the request of Anderson he gave P. A. Howard credit on his books for the proceeds of the Clay note given for his fee, and he did this because they both owed him and he still, by giving credit, kept the money." Just why he might not keep his own money without giving P. A. Howard credit by it is not explained. Anderson testified that the $250 payment was part of the compromise amount, and not a fee to the plaintiff. This was the only statement made by Anderson which the plaintiff, when recalled, disputed. In regard to the note sued on the plaintiff stated that "long after the Clay fee was paid he made an arrangement with Anderson by which he was to have all the benefit of the note." This concedes, just as we interpreted the reply, that the note was executed to plaintiff as trustee in secret trust for the plaintiffs in the Bourbon suit; for it admits that he did not become entitled to the proceeds until the arrangement made long after July 3, 1876. The plaintiff further testified that "he took for Clay in the Bourbon suit the deposition of Josiah Anderson and also gave his own deposition for Clay."

These depositions may, therefore, be looked at to see if they make suggestions agreeing or disagreeing with the interpretation we have given to the reply. The substance of the plaintiff's evidence was that Clay had not consented to the arbitration alleged in the Bourbon action; and that plaintiff had a conversation in his office with Anderson and P. A. Howard, in

which both told him "that Clay did not owe them one cent, and did not at the time the suit was instituted, and had not at any time since owed them anything; and they both told me that plaintiff Howard had not paid Anderson anything for the debt sued on, and had not agreed to pay him anything, and that they did not know it was worth anything; and had brought this suit to see if they could recover, and thought if they did it would be that much clear gain." A more complete defense can not be imagined. Anderson had no claim on Clay; he had not been paid for it by Howard; they did not know it was worth anything; and under the circumstances they thought that if they recovered anything it would be that much clear gain. This inference drawn from the premises not even a schoolman could have had the hardihood to dispute.

Anderson's testimony was in substance that the conversation as detailed by Cornelison occurred as stated; that Clay was not a party to the alleged arbitration; that P. A. Howard did not pay or agree to pay him anything for the transfer of Clay's obligation or of the award. As to the fact of Clay's indebtedness in the obligation, independent of the award, he was not, as a witness, quite so luminous as he was, when in company with P. A. Howard, in the office of Clay's attorney, he said only: "I can not state that Howard, Barnes & Co., would, upon a settlement of all the transactions between us, owe me anything on the writing sued on executed by defendant Clay." It may be observed that the examiner's certificate shows that the attorney of P. A. Howard and Josiah Anderson was not present when these depositions were taken "for Clay" by the plaintiff in this action. It seems possible that, if he had been there, he might, by a pressing and ingenious cross-examination, have extracted from Anderson that which he swore in this action, without pressing, viz., that notwithstanding the declarations made to Clay's attorney in his office, the debt on Clay was a just demand.

The date of the conversation is not given; but we can not conceive that the plaintiff could wish it inferred that it was before the compromise was agreed on; he was Clay's attorney; both he and Anderson agreed that Clay was to pay $250 on the compromise; surely with such assurances from both Anderson

and Howard that Clay did not owe one cent, he would not have permitted his client to pay $250, and his client's kinsman to pay $500, to settle a suit confessedly brought on a demand admitted not to exist. The pleadings show that Clay's obligation was to pay to Anderson whatever balance might be due Anderson on a settlement with Howard, Barnes & Co.; Anderson claimed there was a balance, and Clay denied. If there was no balance due, in point of fact, and if Anderson and Howard knew, as they say they told Clay's attorney, and as Clay's attorney testified they told him that there was no balance due Anderson, there was at the time of the compromise no debt in dispute to be compromised. Assuming that before the compromise Anderson and Howard went to Clay's attorney and formally admitted that they had no claim on Clay; that they had brought their suit, not because he owned them anything, but with the hope they might get an unjust judgment: it was a formal withdrawal of their demand; there no longer remained anything in controversy; there was no pending dispute to be settled by a compromise; and for that reason the note for $500 would have been without any consideration.

If the conversation occurred after the compromise was made its purpose is readily seen; the declarations were made in order that they might be proved. The very completeness with which they exclude the possibility of a recovery against Clay renders this conclusion inevitable. As a witness, not fearing a cross-examination, Anderson does not say that no balance was due from Howard, Barnes & Co. His guarded language was: "I can not state" there was. Why? Because it was not true or because a prudential consideration prevented? In the same sense it was impossible for the plaintiff to state the real consideration of the note sued on: "I could not, because if it appeared." The fact that in his evidence in this case Anderson stated that "the claim on Clay I assigned Howard was a just one," is conclusive.

This evidence agrees exactly with what we understand the reply to mean; that it was part of the consideration of the note sued on; that the plaintiff should defeat the attaching creditors by an ostensible defeat of Anderson and Howard, without regard to the merits of their claim, to the end that

thereby Clay should escape liability under the attachments, and that Anderson and Howard should pocket the money which, but for this "arrangement," those creditors "might be entitled to."

It is too plain to need comment that the defeat of the attaching creditors was essential to Clay's protection. It was in recognition of this fact that the parties were at sea as to how it could be done, and that the plaintiff found himself unable to state the fact as it was in the writing he gave to the defendant. It was, therefore, a part of the entire consideration for the note, and if that part was illegal the whole contract was void. (1 Parsons' Contracts, 380.)

If the facts as alleged show fraud, it is not essential that they should be denominated as fraudulent, since the facts themselves constitute substantive fraud (Pryse v. McGuire, 5 Ky. Law Rep., 716). If, therefore, the agreement to defeat the attaching creditors by defeating ostensibly, but by compromising really, the Bourbon suit belongs to that class of undertakings which the law adjudges to be fraudulent, the reply is to be read as if it admitted that the agreement made belonged to the class denounced.

It is now suggested "that the reply will, without violence to its language, admit the following construction: That Anderson and not P. A. Howard was the real and beneficial owner of the claim being asserted in the action in the Bourbon Circuit Court, and that the creditors of P. A. Howard were in point of fact seeking to attach and apply to the payment of their debts against P. A. Howard this claim apparently owned by him, but really the property of Anderson; that these facts were known to Cornelison and appellant, and that each and all the parties to the transaction connected with the execution of the note for $500 understood that it could not result in depriving the creditors of P. A. Howard of one dollar to which they were entitled either in law or morals, but upon the contrary its consummation would enure to the direct benefit of Clay, the client of Cornelison, and would secure to Anderson the partial benefit of a claim of which he was the real owner."

It may be observed that the rule presupposed by the distinguished counsel for the appellee is not that which the law prescribes; we may not interpret the reply as suggested merely

because it might be so done "without violence to its language," for that would be to reverse the rule, and to take that meaning most favorable to the pleader which falls short of doing violence to his words. On the contrary, we are required to take that meaning least favorable which does no violence to the language. But whether the reply is interpreted by the one rule or the other we do not think the suggested version can be maintained. So plain a statement could have been easily made. If it was intended, why was it not in some way or other alleged? The only intimation that can be found in the reply is that "Anderson, perhaps, was the real owner." That is not an allegation that he was the owner. If it was Anderson's, and not liable in law or morals to be taken for P. A. Howard's debts, why did the plaintiff allege that if he had stated the real consideration in the writing given to the defendant, Howard's creditors "might be entitled" to the $500? Was it his opinion that the creditors might be entitled to a fund to which they could not be "entitled either in law or morals?" Why was not the $500 note executed to Anderson directly? Why was it deemed expedient to state that it was for a fee? Why should Anderson and the defendant, having agreed on the terms, have been so bewildered as to "how" the compromise could be carried out, if the debt was going to Anderson and Howard's creditors could not subject it in any forum? The nice and elaborate care taken with reference to the attaching creditor shows that, in their opinion, he was the lion in the way. Recurring to the evidence, merely to show that our interpretation is exactly that which the parties themselves gave it, we find Anderson, introduced by plaintiff to maintain his pleading, declaring expressly that he thought that he and Howard had better get $750 than nothing, without the slightest hint that he was the real owner of the claim, and the plaintiff declaring that P. A. Howard got credit for the $250 paid by Clay.

The distinguished counsel for the appellee says that this court had adjudged his client "guilty of conduct at once unprofessional and contrary to good morals and fair dealing." In the opinion to which this complaint refers the same interpretation was given to the reply which is given in this response. After a thorough reconsideration we are satisfied that we read

that reply correctly. We did not decide that he did the things recited, but only that he said he did them. We indulged in no characterization of the conduct of the appellee, but stated what we believed then, and yet believe to be, the just legal value and effect of his own pleading. Elsewhere counsel says "it was the duty of Cornelison, as attorney for Clay, to defeat the collection by Reid, Samuels and Jordan of their demands against P. A. Howard off his client, Clay, by defeating a recovery in the action of P. A. Howard and Anderson against Clay. It being his duty so to do, it was not illegal, immoral or vicious for him to engage in a transaction with the appellant and Anderson looking to that result. It is true he may have sought to bring about the legal and proper result above indicated by the perpetration of a fraud upon Reid, Samuels and Jordan, and thus have rendered vicious a transaction which was in its face proper and commendable." In the justness of this observation we concur. It was the appellee's duty to achieve a victory both as against the Bourbon plaintiffs and the attaching creditors if he could do so "in the fair field of fighting men." But it was neither his duty nor his right to engage in a transaction which was intended to enable P. A. Howard to withdraw his property from the demands of his creditors; and especially when that property was attached by an order of court, his client resting then under a judicial prohibition from paying to Howard what he owed him.

Whether the transaction resulted in the defeat of the attaching creditors as a matter of fact is not important. It is enough if that was the end to be accomplished, and the achievement of which formed part of the consideration of the note. In the Court of Appeals, in a MS. opinion delivered January 3, 1873, by Judge Lindsay, it was held that there could be no recovery in an action for "legal services to place your property beyond the control of your creditors."

"It has always been the policy of our laws to subserve and protect the interests of creditors; and when the common law, or the rules of equitable procedure, have been found ineffectual to protect their rights against the fraudulent schemes and devices of dishonest debtors the legislature has unhesitatingly given its

assistance by statutory enactments conferring additional powers upon the judicial tribunals. * * An attorney violates his duty in advising or instructing those applying to him for counsel or instruction to attempt a dishonest evasion of the law. * * When such advice is given, or when the client is instructed as to the means by which his creditors may be defrauded, the attorney is not discharging the duties of his office according to law, but in direct violation of it; and a promise on the part of the client to pay for such advice will not be implied, nor will an express contract to pay for it be enforced."

If an attorney can not recover for services in devising a plan whereby creditors may be hindered and delayed, certainly neither he nor anyone else can recover for executing that plan. Whether the agreement was that the appellee as an attorney or as trustee for Anderson and Howard would, as part consideration of the note, defeat Howard's creditors, the result would be the same.

It is a well-established rule that while the law presumes that a note was executed upon a sufficient consideration, and that, therefore, when a defendant pleads there was no consideration he must overcome the presumption by evidence, or fail in his defense, yet if the plaintiff unnecessarily alleges the actual consideration, whether in his petition or in his reply, the burden is on him to prove it as alleged, if it is denied, or he will fail in his action (Boone v. Shackleford, 4 Bibb, 68; Bullitt v. Ralston, 1 Marsh., 331; Steadman v. Guthrie, 4 Met., 152; Noe v. Keen, Sup. Ct., April 30, 1884). If the special consideration alleged is one which the court can pronounce as matter of law insufficient to uphold the note, the plaintiff by pleading it shows he has no cause of action. If he alleges it in his petition there can be no doubt that a general demurrer to that petition should be sustained. If he alleges it in his reply the plea destroys the presumption that there was a consideration, which presumption alone made the petition good, and, therefore, leaves the petition itself insufficient, the presumption which made it good having been displaced by the plea of a particular consideration. If that particular consideration is illegal, then the reply, so far from performing its proper func-

tion of supporting a cause of action alleged in the petition, takes away all the support it had, and leaves nothing to uphold it.

This was the condition of the pleadings when the defendant filed a demurrer to that part of the reply which pleaded the special consideration which, in our opinion, was insufficient to support the action. Having pleaded that special consideration he could not recover except upon it. The demurrer, therefore, disputing its sufficiency disputed the right of the plaintiff to take another step towards a judgment, as every step must necessarily be erroneous.

It was not a special demurrer as suggested. It was general. "A general demurrer is an objection to a pleading, because it does not state facts sufficient to constitute a cause of action or a defense; or because it does not state facts sufficient to support a cause of action or a defense." (Civil Code, section 93.)

The reply substituted the particular consideration pleaded for the general consideration presumed. If the particular consideration pleaded was valid the cause of action was supported by it. The demurrer raised the question whether it was sufficient for that purpose. We think it should have been sustained.

No question is or can be made that the assignment of errors in overruling the demurrer is sufficient.

One of the grounds on which the motion for a new trial rested was that the court refused to give instructions asked by the defendant, Nos. 1, 2, 3, 4, 5. The assignment also designates the refused instructions by the figures. The bill of exceptions shows that the court refused to give instructions Nos. A, B and C, asked by the plaintiff, and refused to give instructions marked D, E, F, G and H, asked by the defendant, and of its own motion gave instructions marked No. 1, No. 2, No. 3; and that these were all the instructions asked or given on the trial. If the bill of exceptions had not designated the refused instructions, but merely had said that the defendant moved the court to instruct the jury as contained in the following five instructions, and the defendant in his motion and grounds and in his assignment of errors had complained of the refusal to give each of the five, there could be no doubt that the instructions would have been well identified. Mere false description does

not affect that which is otherwise sufficiently defined (Broom's Legal Maxims, 605). It is impossible to believe the bill of exceptions and yet doubt that the five instructions which it describes as marked by five letters, and which it says the defendant asked for and the court refused, are the same referred to by the defendant as designated by five figures.

All of the instructions asked by the defendant assumed that the burden was on him, and, therefore, predicate the duty of the jury to find their verdict for him upon their believing certain hypothetical cases stated; but in the state of the pleading this was beneficial to the plaintiff, and may be disregarded. Instruction marked E in the bill is this:

"If the jury believe from the evidence that the execution of the note grew out of an arrangement between P. A. Howard, H. C. Howard, J. J. Cornelison and Josiah Anderson, or any of them, with plaintiff Cornelison, by which Cornelison and Anderson interposed and so prepared the case of Howard and Anderson against Clay, and caused the case to be decided in favor of Clay for the purpose of defeating Reid, Samuels or Jordan in collecting their debts, and it did so defeat them, the note was executed on a vicious consideration, and the jury should find for the defendant." We do not say that this instruction should have been given if the reply had not on its face disclosed that the consideration was illegal, but with that act so disclosed it should have been given.

The petition for a rehearing is overruled.

A. T. Wood for appellant.

H. L. Stone and Wm. Lindsay for appellee.

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## KENTUCKY BAR ASSOCIATION.

The third annual meeting of the Bar Association will be held in Louisville on June 26th and 27th. Besides an address by the president, Hon. C. F. Burnam, and an annual address by Hon. H. L. Stone, there will be discussions on the following subjects:

1st. Whether or not a codification of the body of our law is practical and expedient?

2d. What, if any, additional regulations should be imposed upon the filing and consideration of petition for rehearing in our appellate courts?

3d. Is is desirable to amend our laws regulating assignments for the benefit of creditors?

4th. Is it lawful to amend our tax laws so as to include all property for taxation, except such as is used for governmental purposes?

There will also be papers read upon various subjects of interest to the profession. Such as the "use and abuse of the injunction" and "our warehouse laws." It is hoped and expected that the attendance will be as full as last year. The meeting will be closed by a dinner at the Galt House, where more than the usual number of good toasts will be drunk and good things eaten. The following are the officers and standing committees:

Mr. Curtis F. Burnam, of Richmond, President.

Mr. Laban T. Moore, of Catlettsburg, First Vice-President.

Mr. Henry C. Burnett, of Paducah, Second Vice-President.

Mr. James A. Beattie, of Louisville, Treasurer.

Mr. Horace C. Brannin, of Louisville, Secretary.

Members of the Executive Committee, other than the President and Secretary, who are ex-officio members: W. O. Dodd, of Louisville; John Mason Brown, of Louisville, and J. C. Beckham, of Shelbyville.

JURISPRUDENCE AND LAW REFORM.

Jno. W. Stevenson ..... Covington.
B. F. Buckner ..... Louisville.
Joshua F. Bullitt ..... Louisville.
D. L. Thornton ..... Versailles.
Jno. Feland ..... Hopkinsville.

JUDICIAL ADMINISTRATION AND LAW REFORM.

James Speed ..... Louisville.
W. P. D. Bush ..... Frankfort.
George M. Davie ..... Louisville.
W. L. Porter ..... Glasgow.
J. P. Hobson ..... Elizabethtown.

## LEGAL EDUCATION AND ADMISSION TO THE BAR.

Wm. Chenault.....Louisville.
Chas. H. Fisk.....Covington.
Henry Burnett.....Paducah.
Emmett Field.....Louisville.
R. P. Jacobs.....Danville.

## GRIEVANCES.

Basil W. Duke.....Louisville.
W. A. Sudduth.....Flemingsburg.
J. D. Hunt.....Lexington.
Laf. Joseph.....Louisville.
S. E. DeHaven.....Lagrange.

## MEMBERSHIP.

Temple Bodley.....Louisville.
Chas. J. Helm.....Newport.
Wm. Alexander.....Brandenburg.
Jno. Bennett.....Richmond.
Ira Julian.....Frankfort.

## NECROLOGY.

John Mason Brown.....Louisville.
W. C. P. Breckinridge.....Lexington.
W. F. Browder.....Russellville.

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## NEW BOOKS.

Meyer's Federal Decisions. Cases argued in the Supreme, Circuit and District Courts. Vol. III, Gilbert Publishing Co., St. Louis, Mo.

We have several serious objections to the plan of this work. We think the Supreme Court cases ought to be left out. There is already an excellent and cheap edition of those reports. Then we think all of the circuit and district cases should be published in full, excepting those on such special subjects of limited interest as admiralty, patent and revenue cases. The profession will always look askance at a collection of abstracted cases. And further, the catch lines should be placed in the margins and not set up in the text of the opinions. A reprint of the circuit and district court decisions is much needed and

would be appreciated by the profession. This series might be satisfied to aim at no more than such reprint and at the making a complete index to the work. Too much can not be said in praise of the publishers' work; the volumes are well called imperial octavo.

# ABSTRACTS OF CASES

—IN THE—

# COURT OF APPEALS AND SUPERIOR COURT

**Not to be reported in full—Alphabetically arranged according to their subject-matters.**

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Advancements—

Amount of note intended as advancement—That the amount of the note sued on in this case was intended by the payee as an advancement to the payor's wife, his daughter, is evidenced by the peculiar form of the note, which is an undertaking to pay a certain amount with interest, "or as much of said amount as may be called for," coupled with the fact that the payee said soon after the execution of the note that he had given the amount thereof to his daughter, and never intended to collect the note executed by her husband therefor, and the further fact that, although he lived five years after the execution of the note, he never sought to collect either the principal or interest thereof; and it is fairly inferable that the paper was written in the form of a note by mistake. Williams v. Barnes' Adm'r. May 24, 1884. Bullitt Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. J. T. O'Neal for appellant; F. P. Straus for appellee. (See same case decided by Sup. Ct., 4 Ky. Law Rep., 727.)

Appeals—

1. Dismissal—Filing of transcript by appellee—Upon a motion to dismiss because the transcript was not filed in time, a partial transcript by appellee upon a former motion to dismiss, based upon the ground that the assignment of errors was not filed in time, can not avail the appellant, whose schedule calls for a copy of the entire record. The partial transcript filed by appellee was not such a transcript as the Code provides the appellee may file with the same effect as if filed by appellant. Smith v. Fowler. May 24, 1884. Hardin Cir. Ct. Opin. by Bowden, J., Sup. Ct., dis. J. P. Hobson for appellant; Montgomery & Marriott for appellee.
2. Exceptions—Where the law and facts in an ordinary action are submitted to the court the court's conclusions of law can not be reviewed unless excepted to. An exception to the judgment is not sufficient.
3. Assignment of errors—An assignment as error that the court overruled the motion for a new trial does not authorize an inquiry into the sufficiency of the evidence to support the judgment. Paducah & E. R. R. Co. v. Terrell. May 14, 1884. Lyon Cir. Ct. Opin. by Bowden, J., Sup., Ct., aff. H. Cummins and P. H. Darby for appellant; J. G. Husbands for appellee.

4. Appeal by Commonwealth—The amendment of March 4, 1880, to section 353 of the Criminal Code, providing that a judgment in a misdemeanor case shall be reversed for any error of law prejudicial "to the substantial rights of the defendant," can not be construed as taking away the jurisdiction to reverse upon the appeal of the Commonwealth, which is conferred by section 347 of the Criminal Code. The use of the word "defendant" was clearly an oversight. Commonwealth v. Messmore. April 30, 1884. Hickman Cir. Ct. Opin. by Bowden, J., Sup. Ct., overruling motion to correct mandate. C. H. Thomas for appellant; White & Reeves and Geo. W. Griffey for appellee.

5. Dismissal—Original jurisdiction - The Superior Court has no power to institute an original inquiry as to the existence or validity of an alleged contract of compromise of the subject-matter of litigation for the purpose of determining whether the appeal should be dismissed, although the issue is made by proper pleadings under section 758 of the Code. City of Newport v. Woods, &c. April 30, 1884. Campbell Ch. Ct. Opin. by Richards, J., Sup. Ct., overruling motion to dismiss. C. J. Helm for appellant; E. W. Hawkins for appellees.

6. Verdict tested by law as given—Wherever the appellant has waived his right to have the instructions passed upon the court, in passing upon the sufficiency of the evidence to support the verdict, will test the verdict by the law as given to the jury, and not by the law as it should have been given. Louisville & N. R. R. Co. v. Connelly. May 7, 1884. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. M. J. Dudley and W. Lindsay for appellant; O'Hara & Bryan for appellee.

7. Plea of limitation—Where it is sought to have an appeal dismissed upon the ground that it is barred by the limitation of two years, the question must be presented by a verified plea, as provided by section 758 of the Code. Reeves v. Davis' Adm'r. April 30, 1884. Fleming Cir. Ct. Opin. by Richards, J., Sup. Ct., overruling motion to dismiss. W. H. Cord for appellant; J. H. Power and E. W. Hines for appellee.

8. Waiver of error—The fact that counsel for appellant claimed the right to close the argument after the court had instructed the jury that the burden of proof was upon appellant does not preclude him from having a reversal for the error in the instructions as to the burden of proof. Noe v. Keen. April 30, 1884. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. T. C. Bell for appellant; J. W. Lewis for appellee.

9. Appellee having made its answer a cross petition against third parties and prayed judgment against them in the event plaintiff obtained judgment against it, and the court having dismissed both the petition and cross petition upon an appeal by the plaintiff, he alone is entitled to relief. If appellee desired to have its contingent prayer acted on it should have prosecuted an appeal from the judgment dismissing its cross petition. A. Duvall for appellee; W. S. Darnaby for cross petition defendant.

Assignment of Errors—

1. Failure to file—Where the appeal is granted by the clerk of this court, and is docketed without an assignment of errors having been filed, it will be stricken from the docket on motion of appellee unless an assignment is tendered before the order is made, and in that event the appel-

lant will be allowed to file his assignment. Newman v. Long & Co. May 24, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., overruling motion to strike from docket. Brown & Davie for appellant; A. E. Willson for appellees.

2. As it does not appear from the judgment that the court has rendered the decision complained of by the assignment of errors, the judgment must be affirmed. The Code requires the action or nonaction of the court to be assigned as error, and not the reason therefor. First National Bank of Springfield v. Wilson & Muir. April 30, 1884. Nelson Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Bowden, J., delivered separate opinion.

Assignment for benefit of creditors—

1. Fraudulent preference—An insolvent debtor transferred certain warehouse receipts to his surety for the purpose of indemnity, and the surety pledged them with creditors of the debtor to secure them in the debts for which he was bound as surety.

   Held—That this was a fraudulent preference. The fact that the receipts were pledged as collaterals in consideration that the creditors would forbear to sue for one year can not change the condition of the parties or destroy the conclusion that the design was to prefer. It had that effect, and the mere agreement to indulge the debtor or his surety is not a sufficient reason for taking the case out of the statute against fraudulent preferences.

2. Attachment—The levy of an attachment upon the property of the debtor after the act of preference gave the attaching creditors no priority over other creditors. Scanlan, &c. v. Wickliffe, &c. May 1, 1884. Nelson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. J. W. Thomas for appellants; Muir & Wickliffe for appellees.

Bill of Exceptions—

1. Instructions—While to enable the court to pass upon the action of the lower court in giving or refusing instructions, it is not necessary that the bill of exceptions should contain the direct statement that it contains "all the instructions given and refused," such language must be used in the bill as will clearly indicate that all the instructions given and refused are included. Louisville & N. R. R. Co. v. Connelly. May 7, 1884. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. M. J. Dudley and W. Lindsay for appellant; O'Hara & Bryan for appellee.

2. When the appellant, at the proper time, tenders his bill of exceptions in a completed state to the judge to be signed he has done all that is required of him, and for any delay in the signing of the bill he is not to suffer. Arnold v. Hicks. May 23, 1884. Washington Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. T. C. Bell for appellant; J. W. Lewis for appellee.

Boundary—

1. Recognized line—Limitation—Appellee having purchased a tract of land between which and a tract owned by appellant a fence had long been recognized by appellee's vendor and appellant as the line, and he was informed by the vendor that the fence was the line, he can not claim beyond the line thus established, although his deed embraces land beyond it.

2. Adverse possession—Possession by appellant for more than fifteen years

claiming to the fence as the line, bars the appellee's right of entry. The fact that appellee's vendor claimed to the extent of his boundary can not alter the result, as he recognized the fence as the line. Byersdorfer v. Shultz. May 22, 1884. Pendleton Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. A. R. Clarke for appellant; Duncan & Barker for appellee.

Contracts—

1. Consideration—While a written obligation is prima facie evidence of a valid consideration between the parties, and, as a general rule, if the obligor impeaches it the burden is upon him, yet the presumption of a sufficient consideration ceases to exist whenever the party relying upon the agreement undertakes, though unnecessarily, to show what was the consideration, whether in his petition or by way of reply. Noe v. Keen. April 30, 1884. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. T. C. Bell for appellant; J. W. Lewis for appellee.
2. Mental incapacity—As it does not appear that the mother of appellants, whose deed they seek to have cancelled because of her mental incapacity, was at the date of the deed mentally incapable of understanding and comprehending the character, object and nature of the contract, it is immaterial what may have been her mental condition before or after the contract. Richardson, &c. v. Hunt, &c. May 3, 1884. Pulaski Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Parker & Stone for appellants; Pettus & Pettus for appellees.

Conveyance—See parties—

Construction — Contingent estate — Under a conveyance to a married woman "and to such child or children she may have by the said husband at the time of her death, or to the descendants of any such, if descendants there should be," a child of the marriage takes only a contingent interest, and not a vested or present interest, and was not a necessary party to an action by the husband against the wife for a sale of the property and reinvestment of the proceeds under the act of 1862 (Myers' Sup., 426), which authorizes the sale of such contingent estates. Wilson v. Graham. May 3, 1884. Lou. Ch. Ct. Opin. by Hines, J., Ct Ap, aff. J. S. Pirtle and Geo. B. Eastin for appellant; Mix & Rogers and Alex. P. Humphrey for appellee.

Corporations—

Organized under General Statutes—Requisites—The corporate existence of associations provided for in chapter 56, General Statutes, depends upon and begins only after the terms of the law are substantially complied with, and until the notice required by section 5 has been published the association has no right to begin business as a corporation. Therefore, the members of an association having participated in the profits thereof, and gotten the benefit of goods sold to the association, are liable as individuals therefor, the notice required by section 5, chapter 56, General Statutes, never having been published. Robinson & Co. v. Harris, &c. May 29, 1884. Muhlenburg Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. J. S. Kline, J. C. Thompson, M. C. Hay and W. Lindsay for appellants; A. Duvall and D. W. Lindsey for appellees.

County Court—

Allowance for medical services to the poor—To make medical services to the poor a charge upon the county the party rendering them must proceed under authority obtained from the county, but the county judge is expressly limited by statute in creating such charges to $100 for anyone term, and to amounts not exceeding $50 for anyone object.

Upon appeal to the circuit court from an order of the county court, allowing appellee $25 for medical services to two poor people, the circuit court increased the amount to $150. Held—That as the claim was for services to two persons, it should be treated as a charge for two objects, and, therefore, the order is valid to the extent of $100, but no further. Meade County v. Able. May 26, 1884. Meade Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. C. B. Fontaine for appellant; H. T. Kendall for appellee.

Criminal Law—

Robbery—Instructions—Upon the trial of appellant under an indictment for robbery alleged to have been committed by assaulting T. and putting him in fear of injury to his person and danger of his life, and feloniously taking from him against his will the sum of $25, it was error to instruct the jury in substance that if they believed the accused made an assault upon T., and against his will forcibly took from him the money, the law is against the accused. The instruction is erroneous, because it fails to require the Commonwealth to show that the money was taken feloniously from T.'s person or in his presence, by putting him in fear of some personal injury or danger to his life. Hamilton v. Commonwealth. May 1, 1884. Henderson Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. John Young Brown for appellant; P. W. Hardin for appellee.

Evidence—

1. Res gestæ—Recalling witness—In this action for willful neglect the court did not err in refusing to permit a witness to be recalled after the evidence was through, to testify that sometime after the injury by the explosion of a boiler the superintendent had told the witness that the company knew the boiler was defective and induced the deceased to continue to run the engine under the promise to repair it. The evidence was incompetent, as it was not a part of the res gestæ, and the party alleged to have made the statement was himself a competent witness; but if competent, it should have been offered on the examination of the witness. Black's Adm'r v. Marion Co. May 3, 1884. Jeff. Ct. Com. Pleas. Opin. by Hines, J., Ct. Ap., aff. Rodman & Brown for appellant; A. Barnett for appellee.
2. Assignment of bond—In an action for damages for the breach of a title bond alleged to be lost the execution of the bond was denied, and a pleading in another action which was relied upon as evidence of the execution of the bond and its contents showed also the transfer of the bond by the plaintiff for a valuable consideration and the indorsement of the assignment on the bond. There was nothing to show its retransfer to the plaintiff. Held—That he failed to make out his right of action. The evidence of the assignment should have the same effect as if the bond, not having been lost, had been filed as part of the petition, which would have been held bad on demurrer. Hawley v. McCall, &c. April 30,

1884. Kenton Ch. Ct. Opin. by Bowden, J., Sup. Ct. Reh'g granted and rev. Hallam & Perkins for appellant; Eginton & Gray and A. G. Simrall for appellees.

Executions—

Sale of land—Redemption—A debtor whose land has been sold under execution can not be allowed to redeem after the expiration of the time allowed by the statute merely because he was misled by the promises of another to loan him money to redeem. The mere fact that the person promising to loan the money by an arrangement with the purchaser acquired some sort of an interest in the purchase does not authorize the presumption that the purchaser knew of the promise or was a party to the wrong, if any was perpetrated. Even if the debtor could be allowed to redeem he would have to tender the money before obtaining the judgment. Sayre's Ass'ee v. Green. May 20, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. McKee & Finnell and Collins & Fenley for appellant; O'Hara & Bryan and W. Lindsay for appellee.

Guardian and Ward—

1. Care required of guardian—Nothing more should be required of a guardian than that he should act in good faith and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs. A guardian in Kentucky, who, in delaying to issue execution upon a judgment obtained in Missouri, acted in good faith upon the advice of able counsel there, should not be required to account for loss occasioned by the delay, being placed in a position where he was obliged to act upon the advice of an agent or attorney. The same responsibility does not attach as if he had lived in the county and State where the debtor lived, and could have exercised his own judgment.
2. Lex fori determines status of litigant—Under the law of Missouri the female ward, having arrived at the age of eighteen, was of full age, and had the right to control the execution upon the judgment obtained by the guardian, although not of full age under the law of this State, where she resided. Harris, &c. v. Berry. May 21, 1884. Marion Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. B. Harrison and John McChord for appellants; Sam B. Berry, A. Duvall and Rountree & Lisle for appellee.

Highways—

1. Closing of roads lateral to turnpikes—Section 13 of chapter 110, General Statutes, which provides that when a turnpike shall be built lateral to and within one mile of a public road such road shall, by order of the county court, be closed, is not self-executing, and the road retains its public character until there is an order of the county court closing it.
2. Obstruction of road—The erection of a fence across a public highway is a nuisance, which anyone having occasion to use the road may abate without notice to the land owner, provided this right is exercised without a breach of the peace and without any unnecessary injury to the owner or occupant of the land. This common law right is not taken away by section 41 of article 1, chapter 94, which provides for the imposition of a fine upon the owner or occupant of land for allowing an

obstruction to remain in the road after having received notice of its existence from the surveyor of the road. Hurst v. Cassidy, &c. May 20, 1884. Fleming Cir. Ct. Opin. by Hines. J., Ct. Ap., aff. W. H. Cord, Sr., and Andrews & Sudduth for appellant; Cassidy & McCartney for appellees.

Husband and Wife—

Divorce—The husband may properly require the wife to go where he desires to live, and to live there with him as his wife, and if she refuses to comply with this single demand she is in fault, and the husband's abandonment of her under such circumstances will not entitle her to a divorce; but where a husband, having by marriage precluded himself from all marital rights in the wife's property, abandoned her because she would not sell her city property, purchase in a distant county and remove, the wife became entitled to a divorce on account of the abandonment. She was not in fault for her failure to comply with the demand to sell and reinvest, and it appears that these were the only terms on which the husband wished her to go with him. Hughart v. Hughart. May 26, 1884. Lou. Ch. Ct. Opin. by Bowden, J., Sup. Ct., rev. John S. Jackson for appellant.

Infancy—

Appointment of next friend—The Code contemplates that when an infant, being unable to procure a next friend who will become responsible for costs, sues in his own name, the court may appoint a next friend and allow him to sue in forma pouperis, and the court did not err in so doing in this case. Richardson, &c. v. Hunt, &c. May 3, 1884. Pulaski Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Parker & Stone for appellants; Pettus & Pettus for appellees.

Injunction—

To stay proceedings on judgment—Section 285 of the Civil Code, which provides that "an injunction to stay proceedings on a judgment shall not be granted in an action brought by a party seeking the injunction in any other court than that in which the judgment was rendered," applies as well where the injunction is sought to prevent the collection of the judgment in a particular mode as where it is sought to stay all proceedings on the judgment. Therefore, where an injunction is sought to prevent the sale of particular property upon the ground that it is exempt, the action must be brought in the court in which the judgment was rendered. C. O. & S. W. R. R. Co. v. Reasor, &c. May 3, 1884. Meade Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. H. Cummins and P. H. Darby for appellant; C. C. Fairleigh for appellees.

Separate opinion by Judge Bowden in same case:

Where the petition seeking an injunction assails the right of the judgment plaintiff to enforce his judgment, or assails any process issued for that purpose, the action must be in the court which rendered the judgment, but if it makes no question as to any of these record matters and raises only the question whether the officer is acting within the lines of his authority under the process issued, then the plaintiff is not compelled by section 285 of the Code to go to the court which rendered the judgment.

Judgment—

In favor of dead person void—An action for the enforcement of a lien upon realty having been instituted and judgment rendered in the name of a dead person, and the purchase at the sale made in his name, the judgment and sale are absolutely void. Bess v. Hogan. May 5, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rehearing granted and reversed. Elliott & Hemingray for appellant; Sam'l B. Richardson for appellee.

Landlord and Tenant—

1. Assignment of part of term—Where the entire term of a lessee is for more than two years, an assignment of part of that term, less than two years, does not operate as a forfeiture.
2. Statute of frauds—Where a tenant, under a verbal contract of renting within the statute of frauds, chooses to disregard his contract, he can do so only by treating the renting as one from year to year, and giving the proper notice in order to terminate the tenancy. Phelps v. Nave. April 30, 1884. Pulaski Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Reid, P. J., delivered separate opinion. Parker & May for appellant; Curd & Waddle for appellee.

Limitation--See Trusts, 2.

Lunatics—

Sale of estate—The sale of a lunatic's estate under chapter 53 of the General Statutes were void where the lunatic was not a party to the action and no committee was before the court when the judgment of sale was rendered. The judgment will not be binding on the lunatic unless both he and his committee are before the court. George, &c. v. Bradley. May 27, 1884. Garrard Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. Hill & Alcorn for appellants; W. O. Bradley for appellee.

Measure of Damages—

Failure to deliver—For the failure to deliver personal property pursuant to contract the seller can not be made liable for a loss which could not possibly have been contemplated by the parties.

For the failure of appellant to deliver to appellee the quantity of slop he had contracted to deliver the appellee can not recover as damages the loss on cattle which he had to sell because the quantity of slop delivered was not sufficient to feed them and other cattle he had taken to feed, as it is not alleged that appellant knew when the agreement was made that appellee intended to feed cattle with the slop. The utmost that appellee can recover is the difference between the price he was to pay and the value when it should have been delivered. Smith v. Bailey. May 26, 1884. Hardin Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Montgomery & Marriott for appellant; J. P. Hobson for appellee.

Negligence—

1. Unusual speed of train—In an action by appellee against appellant for the killing of his stock, the finding of the jury that the appellant's train was running at a rate of speed "greater than usual;" that this was not "rendered necessary by any unavoidable accident or delay," and that it

"conduced to the killing of the cattle," was not sufficient to establish negligence, the "usual" speed not being shown that there being no attempt to show that the rules of the company were violated.

2. Checking train—In determining whether there was negligence in failing to stop or check the train in time to save stock upon the track it must be considered whether the train could have been so stopped without violating the obligation the company was under to protect the lives and property under its charge.
3. Evidence—It was an error to permit witnesses to state the distance within which they had seen trains stopped without stating at about what speed the trains were going. L. & N. R. R. Co. v. Marriott. May 14, 1884. Hardin Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Wm. Wilson, Lyttleton Cooke and Wm. Lindsay for appellant; Montgomery & Marriott for appellee.

"No Property"—

In an equity proceeding based upon a judgment at law and return of "no property," it was error to render another personal judgment. Farmer v. Porch & Cook's Ass'ee. Same v. Pomeroy & Co. May 29, 1884. Bell Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. L. Farmer, W. G. Colson and J. & J. W. Rodman for appellant.

Nonresidents—

1. Acknowledgment of deed—The acknowledgment of a nonresident to a deed to lands lying in Kentucky may be taken by the mayor of the city in which he resides.
2. Consent to sale of land—Where a nonresident, proceeded against as such, subsequently appeared and consented to the sale of his land, irregularities in the proceeding were cured, and the commissioner's deed passed the title to the purchaser, the court having jurisdiction of the parties and the subject-matter. Gill v. Light. May 1, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. R. D. Handy for appellant; J. F. & C. H. Fisk for appellee.

Parties—

Joinder of corporation and individual members—Election—In this action by appellant for willful neglect, in which the appellee, a corporation, and its individual members were joined as defendants, it does not appear that appellant was prejudiced by his compulsory election to proceed against the appellee, as there was no cause of action made out against either, and the proof on the allegations of the petition would be competent against either; it is, therefore, unnecessary to decide whether under any circumstances the corporation and its members individually may be joined in an action for willful neglect. Black's Adm'r v. Marion Co. May 3, 1884. Jeff. Ct. Com. Pleas. Opin. by Hines, J., Ct. Ap., aff. Rodman & Brown for appellant; A. Barnett for appellee.

Personal Representatives—

1. Recovery of amount overpaid to creditors—By virtue of section 42, article 2, chapter 39, General Statutes, a personal representative may pay the debts against the estate as fast as assets are received, with the right

to recover back in case the estate proves insolvent, and in order to entitle him to claim the protection of the statute it is not necessary that he should show that the payment was made under a mistake.

2. The creditor is entitled to receive from the sureties of the decedent the amount thus recovered from him by the personal representative. Bowking v. Farmers Bank of Ky. May 14, 1884. Scott Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Geo. E. Prewitt for appellant; A. Duvall for appellee. (See modified opinion. Appeals).

Pleading in Civil Cases—

1. Malicious prosecution—Probable cause—When in an action for malicious prosecution the defendant traverses the allegations of malice and want of probable cause, it is not proper under the Code for him to set out the facts which show probable cause or good faith, as all of them can be given in evidence on the issue made by the traverse. Therefore, in this case the court acted properly in rejecting an amended answer setting out such facts.
2. Burden of proof—The averment by the defendant that the prosecution was "without malice, and because they had probable cause," is a mere traverse of the allegations of malice and want of probable cause. The court, therefore, properly held that the burden of proof was on the plaintiff and that she was entitled to the closing argument.
3. Evidence—Under this traverse the defendants were entitled to prove, as tending to show want of malice and the existence of probable cause, that before taking any step they laid before a practicing attorney all the facts in the case, and that he advised them that the facts so stated were sufficient to justify a criminal proceeding, and the court erred in refusing to allow them to make such proof.
4. Confession by failure to deny—The averments of the plaintiff that she had never been suspected of being guilty of any felony, and in fact never had been guilty, being immaterial, were not confessed by a failure to deny them, and in no way affected the right of the defendants to make any proof they could have made if there had been no such allegations, or if they had been denied. Arnold v. Hicks. May 23, 1884. Washington Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. T. C. Bell for appellant; J. W. Lewis for appellee.

Pleading and Practice in Criminal Cases—

1. Indictment—Several different acts constituting as many different offenses can not be charged in a single indictment otherwise than in separate counts. It is the proper function of an indictment to allege a single offense, and the particular acts which constitute it, with such identifying circumstances as will enable a person of common understanding to know what particular offense is meant, and it should be so certain as to enable the court to pronounce judgment on a plea of guilty.

   An indictment for unlawfully selling liquor, which charges that the defendant heretofore, to wit, on the —— day of —— "did unlawfully sell spirituous liquors, namely, whisky, by retail to divers persons, unknown to the grand jury," charges as many different offenses as may be comprehended by the word "divers," and is, therefore, not good.

2. Evidence—When an indictment for selling liquor charges a sale to a person unknown to the grand jury, and it appears that the purchase proved at the trial was known to the grand jury, the offense alleged is not proved. Yost v. Commonwealth. May 14, 1884. Todd Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. L. Reeves for appellant.

3. Waiver of presence of witness—The accused may waive the presence of his own witness and allow a statement, as embodied in an affidavit, to be read to the jury as evidence, although he can not be compelled to go into his trial upon an admission by the prosecution as to the existence of the facts relied on as a defense. Whether the accused can waive the right of confronting the witnesses against him is not necessary to be determined.

4. Misconduct of attorney in argument—The statement of the attorney for the Commonwealth in argument that the witness for the defense, whose statement was read as evidence, had not been sworn, and that his testimony amounted to but little, while improper was not prejudicial; and, besides, the court was not applied to to check his statements.

5. Evidence—It was not error to permit the Commonwealth to prove where the deceased started from on the day of the killing and his object in going, there being an effort to show that he went to town for the purpose of killing the accused. Taylor v. Commonwealth. May 15, 1884. Mercer Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. P. B. Thompson, Sr., for appellant; Bell & Wilson and P. W. Hardin for appellee.

Rents and Improvements—

Parol gift of land—The father of appellant made to him a parol gift of land, and appellant, at the earnest solicitation of his father, abandoned his home and took possession under the gift, and erected valuable improvements. The appellee, a brother of appellant, with notice of these facts, accepted a conveyance of this land from his father. A dispute arising between appellant and appellee as to the ownership of the land, the question was submitted to arbitrators, who awarded the land to appellant. The appellee refusing to execute a deed, appellant filed his petition, alleging these facts, and prayed for either a conveyance of the land or a lien thereon for the value of his improvements. The defendant alleged that the award was the result of fraud and mistake, and not binding. The chancellor cancelled the award, allowed appellant the value of his improvements, and charged him with rent. Held—That appellant is responsible for rent from the time appellee repudiated the award, if he was then in possession, but no longer. Hoffman v. Hoffman. May 1, 1884. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. Stevenson, O'Hara & Bryan and Wm. Goebel for appellant; Eginton & Gray for appellee.

Separate Estate—

1. Created by antenuptial agreement—A separate estate is that from which the dominion and control of the husband is excluded and from which he is to derive no benefit by reason of the marital relation.

2. How bound—The presumption is that a married woman intends to bind here separate estate for the payment of debts contracted by her for her benefit, and it may be subjected to the payment of such debts.

The fact that in this case the payee of the note executed by the married woman required the property in payment for which the note was executed to be kept insured, does not destroy the presumption that the feme intended to bind her separate estate, as the conduct of the creditor amounted to no more than requiring security which would not destroy his right to look to the separate estate. Cardwell v. Perry, &c. May 24, 1884. Logan Cir. Ct. Opin. by Hines, J., Ct. Ap., rev. W. F. Browder for appellant; A. G. Rhea for appellees.

3. A separate estate may be created in a married woman with the power to mortgage, although the statute does not allow her to do so unless the power is given by the instrument under which she holds. Norris v. Cromie. May 1, 1884. Lou. Chy. Ct. Opin. by Hargis, Ch. J., Ct. Ap., aff. Russell & Helm for appellant; C. H. Gibson for appellee.

Set-Off—

Against partnership accounts—In an action by the firm of C. & S. against appellants upon account, appellants were entitled to set-off against the claim of the plaintiffs a claim which they held against S., to the extent of the amount due S. upon a settlement of the accounts of the partnership of C. & S., and C. had no right to plead the bankruptcy of S. to prevent the set-off, having no interest in the issue between S. and appellants. Beadles, Wood & Co. v. Carman's Adm'r, &c. May 5, 1884. Graves Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. John A. Mayes, Boone & Stanfield and E. W. Hines for appellants; W. W. Tice for appellees.

Trusts—

1. Acceptance of trust—Where a trustee empowered by the will under which he received his appointment to name his successor appeared in an action instituted by him for the purpose of resigning his trust, and exercised the power thus conferred upon him to designate his successor, no further proof of his acceptance of the trust ought to be required after a great lapse of time.
2. Limitation—Where a trustee in whom is vested the legal estate in land is barred by limitation the cestui que trust is also barred notwithstanding his infancy. Barclay, &c. v. Goodloe's Ex'or. May 22, 1884. Fayette Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Breckinridge & Shelby for appellants; W. Lindsay, James H. Mulligan and Buckner & Allen for appellee.

Wills—

1. Construction of devise - Life estate—Under a devise by a testator to his daughter M. "and her children," and to his daughter F., "and her children," with the provision that if either of the two daughters should die without living children or grandchildren the property devised to her should go to his surviving daughter and her children, and if both should die, and either of them have no children, that the property devised to her should go to the children of his other daughter. Held—That the two daughters took a life estate and the children the remainder. No perpetuity or estate tail is created in distributing the remainder on conditions among several classes.
2. Defeasible fee—By the devise to M. and her children, "should she have children," the testator did not intend that M. should take a defeasible fee, as in another clause he provides for the remainder in case of her

death without children. Tyler v. Tyler, &c. May 27, 1884. Lou. Ch. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. C. S. Grubbs for appellant; Ward & McAfee for appellees.

3. Construction—A testator, after declaring his intention to divide his estate among his children equally, or as nearly so as possible, made special devises to his wife and children. In making devises to his children by his first wife he directed that each one should be "charged" with a certain amount in the "settlement" or "division" of the estate, the amount "to be charged" varying in each case. The devises to his other children were without condition. Held—That as to the children of the first marriage each one is entitled to the particular property devised to him, if he so elects, but he must take it at the value fixed in the will. The sums so fixed become part of the general estate so far as may be necessary for the purpose of making an equal distribution. The undevised estate, after the payment of debts, should be first used in this effort at equalization; but if it takes the whole of the undevised property to pay debts the children by the first marriage must be equalized out of the property devised to them at the values fixed in the will, taking into consideration the advancements with which each is to be charged. Winsott, &c. v. Greenwell, &c. April 30, 1884. Nelson Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Wathen, Wickliffe & Wickliffe for appellants; Wm. Johnson and C. T. Atkinson for appellees.

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Ex. J.M.